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CURRENT EVENTS.

CROWDED DOCKETS.—In our article on jury trials in our last issue, we expressed the opinion that very little of the law's delay is in civil cases attributable to the jury system. It is more fairly chargeable to the judges, or to be still more accurate, and to put the responsibility upon the primary delinquent, to the legislative branch of the government, which fails to provide an adequate judicial force. So far as the United States are concerned, the following slip from a newspaper tells the whole story:

"WASHINGTON, D. C., Oct. 10.—The October term of the Supreme Court of the United States opens here to-morrow with a larger and more crowded docket than ever before. A year ago when the court met there were 1,033 cases on the docket, to-morrow there will be 1,100 facing the court. Last year the court cleared up about 400 cases and with that number as a fair basis of work for the coming year, the court, it may be said, is nearly three years behind, and with fair prospects of running still further behind this and succeeding years, unless Congress does something to remedy matters."

From this it appears that any litigant unfortunate enough to be involved in a "Federal question," no matter how just his cause, or how urgent his need, must after the ordinary delays of the lower courts, submit to the torture of hope deferred for three long years before the Supreme Court of the United States can do him justice. For two good reasons this condition of affairs is utterly inexcusable. One is that the delay is, in many cases, an absolute denial of justice. Under the present conditions of society and business, a delay for three years, is quite equivalent, in evil consequences, to a delay of twenty years in Lord Eldon's time. The other is that it is the constitutional duty of Congress to provide for the due administration of justice, it ought to have the wisdom to do so, and it assuredly has superabundant pecuniary means. The expense of additional judges and courts cannot be pleaded as an excuse in a country in which one of the leading questions of the day is: what shall the government do with its surplus money?

In many of the States the same evil exists; in some it has been partially remedied by the organization of intermediate courts and commissioners, and by following the Federal precedent, of denying to minor litigants the benefit of appellate revision of the judgments of subordinate courts.

That the pecuniary limitation on the jurisdiction of appellate courts is undemocratic, is obvious; it denies to the poor, judicial facilities for obtaining justice enjoyed by the rich. It is, however, unavoidable, and if the the limitation is reasonable, is no doubt judicious. With that limitation and the aid of commissioners and intermediate courts, the fact remains that in most of the States the dockets of the appellate courts are still too full, and the course of justice is still impeded. Whether this results from the litigious spirit of the people, or distrust of the courts of the first instance, might be a question. Whatever may be the cause, the duty of the government, State and Federal, is the same—to provide such judicial facilities as will insure the speedy administration of justice.

NOTES OF RECENT DECISIONS.

INSURANCE—FIRE AND STORM—CONDITION—VACANCY OF HOUSE.—In the Supreme Court of Iowa an insurance case of some interest was recently decided.[1] The action was brought on a policy of insurance against fire and storms, and it appeared that the house was destroyed by "a high wind cyclone or tornado." In the policy was a condition that the company should not be liable while the premises shall be vacant or unoccupied. The tenant before the loss occurred had moved out of the house leaving in it nothing but a few tools.

The court held that a condition in a contract cannot be disregarded when it is attempted to enforce the contract.

[1] Sexton v. Hawkeye etc. Co., The Reporter, Vol 22 p. 402

"The parties contracted that the building should not be permitted to be vacant or unoccupied. We cannot vary or depart from their contract. It may be, but the point we do not determine, that if the condition required the performance of acts which in no way affected the hazard, or the non-performance of which could work defendant no prejudice, that the courts would not regard it. But it cannot be justly claimed that the hezard of "high winds, cyclones, or tornadoes" was not increased by the vacancy of the building. The occupants of a dwelling, for their own safety, and the protection of the property they may have in it, will exercise care for the protection of the building by keeping closed and secure the windows and doors of the house during high winds, which would, to some extent, secure to it increased stability and capacity of resistence to storms. The tools and other articles of the plaintiff, and other articles owned by the tenant in the house at the time of the loss, did not constitute occupancy, as contemplated by the policy. The building was described in the policy as a 'dwelling-house,' and was insured under the policy as such. The contract contemplates that it shall be occupied as a dwelling. Its occupancy, for the purpose of storing tools, jars, etc., did not comply with the condition against the vacancy of the building."

That the condition of occupation expressed in the policy is material to the risk, is well settled by authority. In New York a summer residence was burned; the policy had a condition that it should be void if the house remained vacant without the consent of the insurer for more than thirty days, and a breach of that condition defeated a recovery.[2] And in Missouri there was a like ruling in a similar case, although the plaintiff had left a man in charge, with instructions to sleep in the house every night, which he did until within a few days before the fire, when he left the premises.[3] To the same effect is a Wisconsin ruling on a policy which recited that "unoccupied premises must be insured as such," and vacated the policy if the occupant vacated the premises without immediate notice to the insurer and the payment of additional premium.[4] And in Massachusetts, a shop was held to be "unoccupied" within a like condition in the policy, if no practical use was made of it.[5] And a farm-house is "unoccupied" when it is only used by the owner and his servants to take their meals in, and a barn is "unoccupied" when it is only used for the storage of grain, hay and farming tools.[6] And if the terms are more stringent the condition will be fully enforced; thus, where there was, "warranted a family to live in said house throughout the year," the court held it a breach of the warranty that, at the time of the fire and for some time before, the only occupancy of the house was by two workmen who took their meals there and were at work elsewhere in the day, but slept in the house at night.[7] If the condition is that the house shall not, during the term, become vacant if the assured can prevent it, it is incumbent upon him to prove that the house became vacant by reason of causes beyond his control.[8]

Of course the contract in such cases must receive a reasonable construction, and not only so, but the "unoccupied" condition of the house must be shown to have existed at the time of the disaster, and that, in a proper sense, it was unoccupied. In an Iowa case,[9] the court expresses this limitation thus: "Of course the terms of the contract must receive a reasonable construction. The parties did not intend that one tenant should not move out and another move in. Nor did they intend that the house should be deemed vacant if the occupant should close it and go off on a visit, and not occupy it for a reasonable time."

CARRIER — OF PASSENGERS — MASTER AND SERVANT—DAMAGES—EXEMPLARY DAMAGES. —The Supreme Court of Tennessee has recently held, that a deck passenger on a steamboat may recover, against the owner of the boat, exemplary damages for an assault committed on him by the mate of the boat.[10]

[2] Herman v. Adriatic etc. Co., 85 N. Y. 162.
[3] Cook v. Continental etc. Co., 70 Mo. 610.
[4] Wustine v. City etc. Co., 15 Wis. 139.
[5] Keith v. Quincy etc. Co., 10 Allen 228.
[6] Ashworth v. Builders' etc. Co., 112 Mass. 422; see also Corrigan v. Connecticut etc. Co., 122 Mass. 298.
[7] Poor v. Humboldt etc. Co., 125 Mass. 274.
[8] North American etc. Co. v. Zanger, 63 Ill. 464.
[9] Dennison v. Phœnix Ins. Co., 52 Iowa 457.
[10] R. R. Springer etc. Co. v. Smith, 1 S. W. Rep. 280.

The defense relied upon was, that the plaintiff, consorting with certain deck hands, violated, with them, the rules of the boat, and that the mate had used no more force than was necessary to secure proper behavior by the plaintiff, and preserve the property of the shippers from plunder. And further that if, in inflicting the injury complained of, the mate had exceeded his rightful powers, the defendant company was not liable, as the acts complained of were without the scope of his authority.

It appeared, however, to the satisfaction of the jury, that the mate abused his rather indefinite authority, and in administering the customary discipline to the deck hands, "took in" the plaintiff also, and kicked him in the mouth. The jury therefore rendered a verdict against the defendant company, owners of the boat, for $1,250 damages. Upon appeal the Supreme Court said:

"That the court charged the jury, and we think properly, that if the mate, while in charge of the vessel, committed an unwarrantable assault upon the plaintiff, a passenger, plaintiff might recover.[11] In the opinion of Justice Clifford, of the Supreme Court of the United States, sitting in United States Circuit Court, Rhode Island District, it is said the principles of law applicable to the relations of master and servant, do not fully define the rights, duties, and obligations between carriers and their passengers. The carrier agrees to carry, for hire, the passengers from one place to another, and is responsible for any breach of the obligation they assume, in the ill treatment of the passenger, by himself or employes. And in the case cited it was held that a clerk of a steamer, on one of her regular trips, getting into a dispute with one of the passengers, and inflicting personal injuries upon him, the owner was liable; and this would be so, irrespective of the dispute, and as if none had arisen, although defendant did not authorize the acts of his employe. Exemplary damages, in actions for torts, are given, where fraud, malice, gross negligence, or oppression intervenes,[12] and where the liability of the principal arises from the acts of agents, employes, or officers, the law is well settled, in Tennessee the rule prevails in respect to exemplary damages.[13]

[11] This principle is declared in Thomp. Carr. 352, and in the case, therein reported, of Pendleton v. Kinsley, reported in 3 Cliff. 416.

[12] Sedg. Dam. 35.

[13] Haley v. Mobile & O. R. Co., 7 Baxt. 240; Louisville & N. R. Co. v Garrett, 8 Lea 438; Louisville N. & G. S. R. Co. v. Guinan, 11 Lea 98; see also Sedg. Dam. (6th ed.) note on pages 570, 571.

ACTION OF USE AND OCCUPATION AGAINST A TRESPASSER.

1. General Principles—Necessity of the Existence of the Relation of Landlord and Tenant.
2. The Action Will not lie Against a Trespasser—Illustrative Cases.
3. Summary.
4. Observations—The Doctrine Examined.

1. *General Principles—Necessity of the Existence of the Relation of Landlord and Tenant.*—The general doctrine, supported by an almost unbroken line of authorities, is, that the action for use and occupation lies only where the conventional relation of landlord and tenant subsists between the parties, founded upon agreement, expressed or implied.[1]

And at common law this action could not be maintained upon a lease for years, either pending or after the expiration of the term, "for a lease was considered to be a real contract, the only remedies upon which were, by distress or action for debt on the demise." [2]

While this was the general common law rule, yet, however, a few cases permitted the action.[3]

[1] Wood's Landlord & Tenant, p. 948; Hathaway v. Ryan, 35 Cal. 188; Murdock v. Brooks, 38 Cal. 596; Harley v. Lamoreaux, 29 Minn. 138; s. c., 12 N. W. Rep. 447; Taylor on L. & T., § 636; Abbott's Trial Ev., 351; Carpenter v. U. S., 17 Wall. 489; Boston v. Binney, 11 Pick. 1; Mayo v. Fletcher, 14 Pick. 525; O'Fallon v. Boismenn, 3 Mo. 405, 408-9; Ackerman v. Lyman, 20 Wis. 54; The Aull Savings Bank v. Aull, 80 Mo. 199, 201; Holmes v. Williams, 16 Minn. 164; Hood v. Mathias, 21 Mo. 308, 313; Bancroft v. Wardwell, 13 Johns. 490; s. c., 7 Am. Dec. 396, note; Hutton v. Powers, 38 Mo. 350, 356; Cohen v. Kyler, 27 Mo. 122; Newly v. Vested, 6 Ind. 413; Smith v. Stewart, 6 Johns. 46; The DePere Co. v. Reynen, 65 Wis. 271; s. c., 22 N. W. Rep. 761; Preston v. Hawley, (N. Y.) 2 Central Rep. 762; Vegely v. Robinson (Mo.), 2 Western Rep. 551.

[2] Featherstonhaugh v. Bradshaw, 1 Wend. 135; Taylor on Land. & Tenant, § 635.

[3] Crouch v. Brilles, 7 J. J. Marshall, 257; Pott v.

"In order to obviate the difficulties, which occurred in the recovery of rent, where the demise was not by deed the statute of II Geo. II, C. 19, sec. 14, authorized a recovery in an action on the case, for the use and occupation of the premises."[4]

The Missouri Statute also provides, that "a landlord may recover a reasonable satisfaction for the use and occupation of any lands or tenants, held by any person *under an agreement* not made by deed."[5]

The revised Statutes of New York contain substantially the same provisions, [6] as well as many other state statutes.

It seems that this legislation does not change the general rule, for it is held that the relation of landlord and tenant must still exist to support this action. The law will imply a contract to pay rent from the mere fact of occupancy, yet, no implication can arise where there was no tenancy in contemplation between the parties, or where neither party expected to pay rent,[7] or where the position of the parties to each other can be referred to any other ground than that of a distinct tenancy,[8] or where the occupancy is of such a character as to negative the existence of a tenancy.[9]

Occupancy alone will raise this relation by implication only where it has been with the assent of the owner,[10] and without any act or claim on the part of the occupant, inconsistent with an acknowledgement by the occupant of the owner as his rightful landlord.[11] But this implication may be rebutted by proof of a contract, or any other facts inconsistent with the existence of such a relation.[12]

The authorities affirm that the facts must show, expressly or impliedly, that the defendant occupied as tenant of the plaintiff. When a person occupies the land of another, not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, the action of use and occupation will not lie.[13]

And the question as to whether an implied contract of tenancy existed is said to be for the jury.[14]

Many authorities hold that neither an express demise nor an express promise is necessary to sustain this action; but that it is sufficient if the defendant held as a tenant of the plaintiff or by his permission or sufferance, recognizing the plaintiff's title, for the reason that in such cases the law will imply a promise to pay a reasonable sum for such use and occupation.[15]

To sustain the action, "something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant. That relation can only grow out of contract. * * * The contract need not be technical and formal, but there must at least be a permissive occupation by the tenant. Occupation by the tenant with the assent of the landlord is indispensible to the maintenance of the action."[16]

Where the defendant occupies the premises by mere license of plaintiff, it being revocable at plaintiff's pleasure, so long as it remains executory, and, until so countermanded, it can only operate as an excuse for trespass, or, if the occupancy is not with permission of plaintiff, then it is a mere trespass and not a demise. The relation of landlord and tenant

Lesher, 1 Yeat. 578; Roberts v. Lemel, 3 Munr. 253; Green v. Scovil, 4 Day, 228; Epps v. Cole, 4 Hen. & Munf. 161; s. c., 4 Am. Dec. 512.

[3] Taylor's Land. & Ten., § 635.

[5] 1 R. S. Mo. 1879, § 3081, p. 516.

[6] 1 R. S. 739, § 26; Tavlor's Land. & Ten., § 635.

[7] Clark v. Clark's Admr., 2 New Eng. Rep. (Vt.) 213.

[8] Taylor's Land. & Ten., § 636.

[9] Chambers v. Ross, 25 N. J. L. 293, 294. See Moore v. Harbey, 50 Vt. 297, 300.

[10] Wood's Land. & Ten., 948.

[11] Chambers v. Donahue, 44 Vt. 57.

[12] Id.; Stacy v. R. Co., 32 Vt. 551; Hough v. Birge, 11 Vt. 190; Strong v. Garfield, 10 Vt. 502. See Stocket v. Watkins, 2 Gill. & John. 326; s. c., 20 Am. Dec. 438, with note.

[13] Butler v. Cowles, 4 Ohio, 213.

[14] Chamberlain v. Donahue, 44 Vt. 57; Wood's Land. & Ten., 948; Chambers v. Ross, 25 N. J. L. 293.

[15] See Gunn v. Scovill, 4 Day (Conn.), 228; s. c., 4 Am. Dec. 208, which holds that an action of *indebitatus assumpsit*, may be maintained on the implied promise, arising merely from the use and occupation of real estate, by permission, without an express promise to pay rent, and this in the absence of statute, by virtue of common law principles. Wood's Land. & Ten., 699. "Almost any evidence which shows the relation of landlord and tenant to exist between the parties, will support this action. It is not necessary for the plaintiff to prove an express contract with the tenant when he took possession; or any particular reservation of rent; nor that the tenant has once paid rent; for an understanding to that effect will be implied, in all cases where a permissive holding is established." Taylor, § 635; 2 Gill. & Johns. 326; 6 Ad. & El. 839, (n.) See, also, Sutton v. Mandeville, 1 Munford, 407; s. c., 4 Am. Dec. 549; Eppes v. Cole, 4 Hen. & M. 161; s. c., 4 Am. Dec. 512.

[16] Central Mills Co. v. Hart, 124 Mass. 123, 125.

in either case would have no existence between parties.[17]

Where the relation of landlord and tenant does not exist, the possession is to be considered hostile.[18]

In the action for use and occupation, it must be averred in the declaration that the land was occupied by permission of the plaintiff or at the request of the defendant,[19] and where it contains no allegations of any facts showing that the relation of landlord and tenant subsisted between them, at the time of the alleged use and occupation, it fails to state a cause of action, and a demurrer to it will be sustained.[20]

In one case the defendant was in occupation of the premises when the plaintiff became the purchaser and remained in possession more than two months against the latter's consent. It was admitted that the defendant never recognized the plaintiff as his landlord, or agree to pay him rent for the use of the premises. The court held that the relation of the parties did not necessarily suggest a tenancy, and a promise to pay rent would not be implied.[21]

In a Georgia case it is said that a contract may be implied from the title of the plaintiff and the occupation of the defendant. "These being proven a contract will be inferred."[22]

2. *The Action Will not lie Against a Trespasser.*—Hence, under these principles it is uniformly held that this action can not be maintained against a mere trespasser;[23] that a trespasser can not be converted into a tenant without his consent;[24] that if the possession is not under contract, it must at least be permissive, for a tortious occupation will not be sufficient;[25] that mere occupancy does not of itself necessarily imply the relation of landlord and tenant, but that the character of the occupancy and the intention of the parties as evinced by their conduct toward each other must be considered, for as this relation exists, only by virtue of a contract, express or implied, the occupancy must be under such circumstances that a contract can be fairly implied, and this can never be done "unless the entry was by permission of the landlord, either express or implied, and in subordination of his title," hence, "express permission given by the owner to one who is in possession tortiously, will not convert his occupancy into a tenancy unless he accepts such permission and holds in pursurance of it. * * * Therefore, it is erroneous to say that mere proof of occupancy, is sufficient to establish a tenancy. The owner must go farther and show an occupancy under such circumstances that a contract, express or implied, can be predicated thereon, which can never be done unless the original entry were lawful or the occupancy during the period for which rent is claimed was with the assent of the owner, express or implied."[26]

A few cases will be sufficient to illustrate this rule. Hurley v. Lamoreaux,[27] was a suit for use and occupation of certain premises, in the nature of assumpsit. The complaint contained no allegations of any facts showing that the relation of landlord and tenant subsisted between the parties at the time of the alleged use and occupation. A demurrer to the petition was sustained because it failed to state a cause of action—the court holding that this action lies "only where the relation of landlord and tenant subsists between the parties, founded on agreement express or implied."[28] The court further observed: "The plaintiff appears to claim that he has framed his complaint upon the theory of waiving a tortious entry and occupation of the premises by the defendant, and suing upon an implied

[17] Id.; Wood v. Wilcox, 1 Denio, 37; Merrill v. Bullock, 105 Mass. 486, 490.

[18] Espy v. Fenton, 5 Oregon, 423.

[19] Taylor's Land. & Ten., § 651; Bradley v. Davenport, 6 Conn. 1; Hayes v. Warren, 2 Stra. 933.

[20] Hurley v. Lamoreaux, 29 Minn. 138; s. c., 12 N. W. Rep. 447.

[21] Cohen v. Kyler, 27 Mo. 122. See The Aull Sav. Bk. v. Aull, 80 Mo. 199, 201; Edmonson v. Kite, 43 Mo. 176, 178.

[22] Mercer v. Mercer, 12 Ga. 421. Citing Chitty on Contr., 373; 5 B. & Ald. 322; 3 N. & P. 40; 6 Ad. & El. 854.

[23] Taylor's Land. & Ten., § 636.

[24] Hurley v. Lamoreaux, 29 Minn. 138; s. c., 12 N. W. Rep. 447.

[25] Hathaway v. Ryan, 35 Cal. 188; Murdock v. Brooks, 38 Cal. 596.

[26] Wood's Land. & Ten., 6-10.

[27] 29 Minn. 138; s. c., 12 N. W. Rep. 447.

[28] Citing Taylor's Land. & Ten., § 636; Abbott's Trial Ev., 351; Carpenter v. U. S., 17 Wall. 487; Boston v. Binney, 11 Pick. 1; Mayo v. Fletcher, 14 Pick. 525; Ackman v. Lyman, 20 Wis. 454; Holmes v. Williams, 16 Minn. 164.

contract to pay for use and occupation. One obstacle in the way of this claim is that no tortious entry or occupation is in any way alleged. But the insuperable answer to it is found in the authorities above cited,[29] which hold, in effect, that a trespasser cannot be converted into a tenant without his consent."[30]

In Marquette, etc., R. R. Co. v. Harlow,[31] Harlow sued the railroad company for rent for the use and occupation of the land occupied for its tracks. There was no evidence of any agreement to pay rent or for the use and occupation of the land and the only question of liability arose out of what was claimed to be the implied obligation. The testimony showed that the land was entered upon by the company without H's consent or knowledge, but when the company had taken possession he gave consent to building and grading the road, but told the company that it was to gain no rights of the soil, that in his allowing it to grade it was to gain no rights whatever. H. never offered to make a deed to the company of the land and the company never asked for one, and the company was not asked for rent until just prior to the institution of this action. H. said that he had repeatedly told the company that it was a trespasser, but had never given it notice to quit. The court held that, from the above facts, the relation of landlord and tenant could not be inferred and the action must fail.[32]

Gallagher v. Hinelberger,[33] was an action for rent against a trespasser of certain lands. During the defendant's occupancy he was notified by the owner, that the rent therefor was a certain sum per annum, which would be demanded as a condition for its further occupancy, but defendant refused to pay such rent as being too much, but promised to "make it right," and continued in possession. The plaintiff from month to month made out and presented bills at a *pro rata* amount of the whole rent demanded. Defendant refused to make payment. The court held that no express contract for the payment of such sum arose out of such notice, demand and occupancy, but that during the whole of such time the defendant was a mere trespasser, and consequently the action must fail.

The rule announced in National Oil Refining Co. v. Bush,[34] does not seem to accord with the above. In that case, the action was *assumpsit* for use and occupation. The tenant claimed to hold under a written agreement. The landlord denied that the agreement was in force, and notified the tenant that he would eject him in ten days, and hold him liable in damages, which notice three days thereafter was followed by another, notifying him that the landlord considered him a trespasser. The tenant remained in possession sometime thereafter, and then surrendered the premises. The trial court submitted to the jury the question, whether or not the tenant was a trespasser. This the Supreme Court held proper. The trial court instructed the jury that they must find some new contract between the parties to rebut the presumption (that the tenant was a trespasser) arising from the above notices. In holding this to be error, the Supreme Court said:[35] "Such contract was not necessary to the maintenance of the action; it is not necessarily founded upon a specific contract, written or oral, but upon the use of the premises. The occupant may be, in fact, a trespasser, but the owner of the tenement may waive the trespass and recover in *assumpsit*, and it does not lie with the tort-feasor to defeat him by interposing his own wrong. To tell the jury, therefore, that they must find some new contract between the parties, in order to rebut the presumption arising from the notices, was error, for that presumption might well be rebutted by the subsequent act of the parties." But the Supreme Court seemed to be of the opinion that the defendant was a trespasser —that is, if the plaintiff had so treated him his action could not be maintained.[36]

The language of the court in this case seems to be in full accord with the Georgia doctrine, as announced in Mercer v. Mercer,[37] and against the general current of authority.[38]

[29] See authorities in last note.

[30] See Henwood v. Chesman, 3 Serg. & R. (Pa.) 500.

[31] 37 Mich., 554.

[32] See Dalton v. Landahn, 30 Mich. 349; Hogsett v. Ellis, 17 Mich. 351.

[33] 57 Ind. 63.

[34] 88 Pa. St. 335, 340-341.

[35] P. 341.

[36] See Goddard v. Hall, 55 Maine, 579; Featherstonhaugh v. Bradshaw, 1 Wend. 134.

[37] 12 Ga. 421.

[38] See Chambers v. Ross, 25 N. J. L. 293, 294; Dean

3. *Summary.*—From this review of the authorities it has been seen that the courts, with singular unanimity, declare that a trespasser cannot be held to pay rent or a reasonable sum for the use and occupation of lands or tenements, but that before a recovery can be had, the relation of landlord and tenant must be shown to exist between the parties, and to sustain this relation there must be a contract, either express or implied, and hence it is said that as the bare occupancy alone of a mere trespasser can, in no sense, be deemed a holding in pursuance of an implied permission of the landlord—such holding being tortious only—and as a contract, either express or implied, cannot be predicated thereon; therefore, the conclusion is reached, that to find that the relation exists under such circumstances would be to convert the trespasser into a tenant without his consent, and to find against the clear intention of the parties.

Hence the decisions leave it with the wrong-doer, to say whether he considers himself a tenant of the owner, and whether it is his will to pay a reasonable amount for the benefit derived from his use and occupancy of premises knowingly not his own. If he made no contract to pay for such use and occupancy, and is not in possession in pursuance of permission from the owner, but by virtue of his own will only, and he declares that it was not his intention to pay, but derive what benefit he could from his neighbor's property until ejected, the decisions declare that he cannot be held, as the "relation of landlord and tenant" cannot be implied from such holding. But if he takes possession as a trespasser, and afterwards holds in pursuance of permission of the owner, he can be held, for the holding, in "pursuance of permission," converts the trespasser into a tenant with his consent. That is to say, in the case supposed, consent of the trespasser is the controlling element in determining the character of the occupancy, for if the wrong-doer insists that he is not holding as tenant, he must still be considered a trespasser, and, therefore, the indispensable relation of landlord and tenant, upon which a recovery must be grounded, cannot be said to exist. Hence this doctrine, in effect, permits the tort-feasor to defeat a recovery by interposing his own wrongful act.[39]

4. *Observations—The Doctrine Examined.*—Assuming that the relation of landlord and tenant is indispensable to entitle the owner of the premises to maintain his action, the conclusion that a mere trespasser cannot be held, would seem to be irresistible. And hence it appears that upon the assumption of this fact rests the soundness of this doctrine.

Why must this relation exist? If the trespasser knowingly occupies and uses premises not his own, deriving a benefit therefrom, consistent with what principle of reason or justice can it be said that he should not be held to pay for such use? Is the answer that by the mere occupancy the supposed indispensable condition upon which the action is assumed to rest, to-wit, the relation of landlord and tenant, is not created, a sufficient reason? In other words, does the absence of this relation create a justifying excuse to a court in dismissing the action? thus denying a suitor the redress to which, it would seem, according to the plainest principles of reason and justice, he is entitled, by reason of the infringement of a property right, ever held sacred by our law. Though it clearly appears that the plaintiff's rights have been invaded by the defendant's wrong-doing, that his action is meritorious, and that he has been diligent in asserting it, yet, according to this reiterated and persistently followed doctrine, if the latter has not agreed, or if from his acts it cannot be inferred that he intended to remunerate the former for the benefits received, the wrong must go unredressed.

This rule is not in harmony with the general doctrine of implied promises. It is antagonistic to the analogous rule applied to personal property. "With respect to goods, it is a long established rule, that the owner, from whom they have been tortiously taken, may in many cases waive the tort, as it is expressed, and state his demand as arising on contract. It is competent for him to treat the party liable to his action as a purchaser, an agent or a bailee, whose use and disposal of the goods is thereby sanctioned and confirmed; and then the value of the goods as a

v. Pierce, 1 Camp. 467; Hull v. Vaughan, 6 Price, 157; 2 Saund. Pl. & Ev. 890; Chitty on Contr., 332.

[39] National Oil Refining Co. v. Bush, *supra*.

fair compensation for the use of them, is recoverable and to be assessed in damages."[40]

With reference to personal property, in all cases where the defendant has derived some benefit from his infringement of the plaintiff's right, the latter may waive the tort, and sue on the implied contract. Thus, if the thing is money, the defendant must have received it,[41] or if services, he must have derived benefit from them.[42]

The essence of the right to waive the tort and sue on the implied promise seems to be the benefit resulting to the defendant, for unless he receives some advantage from his wrong the plaintiff is denied an action in *assumpsit*.

It may further be observed that where a promise is implied, it is because the party to be charged intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.[43]

It would seem to an ordinary mind that natural justice requires that these principles, which are constantly recognized and enforced with reference to wrongs touching personal property, should be invoked in like manner concerning wrongs to real property, as in cases of the character under consideration. Can a just distinction be drawn between a beneficial use of personal and real property? In each case the common ground of equity is that the defendant, upon his own request, has received a beneficial value without paying therefor, and it seems grossly inequitable that he should be permitted to retain it. The injustice is more palpable when it is considered that the defendant wrongfully obtains the benefit. The eminently just and equitable principle that there is an implied obligation to pay therefor whenever money or property is received, should be applied with equal force in the two classes of cases, without reference to the intent of the party benefited. There are numerous cases where from the circumstances the law implies a legal ob ligation and a promise, though there was no express promise and no intent between the parties to enter into a contract.[44]

In commenting on the palpable injustice of the doctrine under consideration, the learned editor of the *American Law Review*, after referring to the distinction between personal and real property in this respect, said: "Although there may have been in ancient times some foundation for the distinction between real and personal property in this regard, real property in modern times has become little more than a mere commercial property, and no reason whatever exists for keeping up this distinction. The rule which gives such an action in respect to the use of personal property is founded in the most obvious considerations of justice. The law *ex æquo bono* raises or implies a promise on the part of the taker of a chattel to pay the owner what its use is reasonably worth and to recover this the owner might, at common law, sue in *assumpsit*. The denial of the rule in the case of real property not only breaks in upon the uniformity of the law in an important respect, but it leads frequently to injustice. In many cases it will be difficult to determine upon the facts whether the person using and occupying the land entered under a license or as a mere trespasser. If he entered under a license, the request for the license will support the implication of a promise to pay for the use of the land what it is reasonably worth, according to the general doctrine of implied promises. But if it turns out, upon the evidence, that he entered as a trespasser, then the plaintiff is driven at the trial to an amendment of his petition or declaration; in which

[40] Per Jackson, J., in Cummings v. Noys, 10 Mass. 436. "Sundry cases to this effect are stated in Hambly v. Trott, Cowp. 371. As if one take a horse from another and bring him back again, the owner may maintain trespass against the wrongdoer; or, after his death, an action for the use and hire of the horse against the executor. So, in the like case, the owner might waive the trespass as against the original taker, and bring trover against him. 1 Burr. 31. So in Johnson v. Spiller, Doug. 167, note 55, it was holden that a demand in trover may be proved as a debt against a bankrupt, if the demand be of such a nature that it can be liquidated, as for the value of goods converted by the bankrupt." Id.

[41] Gilmore v. Milburn, 12 Pick. 120.

[42] Consistent with this rule, if the defendant's cows have been wrongfully pastured on the plaintiff's land, the latter may waive the trespass and recover in *assumpsit*; Welch v. Bogg, 12 Mich. 42; See Webster v. Drinkwater, 5 Greenleaf, 319; s. c. 17 Am. Dec. 238, with note, where this doctrine is fully and elaborately discussed; see further, Halleck v. Myer, 16 Cal. 574; Fratt v. Clark, 12 Cal. 89; Beely v. Taylor, 5 Hill. 583; Barker v. Cory, 15 Ohio, 9; Howe v. Clancy, 53 Me. 130; Boston R. Co. v. Dana, 1 Gray, 183.

[43] Webster v. Drinkwater, *supra*; Birch v. Wright, 1 T. R. 371.

[44] See in this connection, Paddock v. Kettredge, 31 Vt. 378; Ives v. Hulet, 12 Vt. 327.

case the difficulty may arise that his amendment will change the nature of the action from an action *ex contractu* to an action *ex delicto*, and will hence not be admissible, at least under the modern codes of procedure. If he finds himself in this dilemma, he will be driven to a non-suit, and to the bringing of a new action. Now, a rule of law which results in putting a meritorious, and perhaps diligent plaintiff, to this delay, expense, and perhaps to a total loss of his right of action, through the intervention of the Statute of Limitations, is neither founded in sense nor in justice; and it is a shame that the judicial courts continue with ape-like servility to reiterate it and re-state it in their decisions. It is a thoroughly idiotic and obsolete rule. * * * It is a putrid reminiscence which demands the attention of legislatures."[45]

The prevailing doctrine is, in itself, an absurdity, and rests upon an illogical and unsound basis; it is in direct conflict with long settled and established rules, founded on eminently just and equitable principles; it often leads to the grossest and most palpable injustice, and no degree of respect or reverence should permit it to be laid up among the fundamentals of an enlightened jurisprudence. That it should be still reiterated and followed as a rule upon which rights are determined seems inconceivable; but it may be largely due to the conservatism of the bench which is always slow to cast aside rules which have long existed, however unjust they may be.

The language of the Supreme Court of Pennsylvania[46] contains the germ which should direct future judicial action. The courts should, with one accord, sweep the last vestige of this doctrine from our law as a fossilization of condensed nonsense, unworthy to rank as a legal maxim in the jurisprudence of an enlightened people. If the courts refuse to assume this responsibility legislation should perform this work.

EUGENE MCQUILLIN.

St. Louis, Mo.

[45] 20 Am. Law Rev. 568.
[46] National Oil Refining Co. v. Bush, *supra*.

STATUTE OF LIMITATIONS.

DYER V. WITTLER.

Supreme Court of Missouri, April Term 1886.

1. *Limitations—Statute of—Missouri—Real Estate—Who Affected.*—The Missouri statute of limitations only applies to those having a present existing right to commence an action or make an entry.

2. *Married Women—When Right of Action Accrues—Twenty-four Years Limitation.*—The Statute of limitations does not begin to run against a married woman or her heirs till the estate of her husband ceases, after which ten years are allowed. Valle v. Obenhause, 62 Mo. 81, to this extent overruled.

RAY, J., delivered the opinion of the Court.

This is an action of ejectment, for certain real estate in the City of St. Louis, described in the amended petition, upon which the case was tried. Suit was commenced in May 1878. The defence is the statute of limitations of twenty-four years. Rev. Stat, Sect 3222.

The reply is, that in the year 1838, the mother of the plaintiffs was the owner of the land in fee simple, having inherited it from her father; that she was, at the time, the wife of Abner W. Dyer, their father; that there was issue born alive of the marriage in 1837, that their marital relation continued until 1869, when it was dissolved by the death of the mother; that the father survived and died in 1870; that the plaintiffs are the only surviving issue of the marriage, and claim the premises as heirs of their said mother.

At the trial, evidence was given tending to support this reply. The court, under appropriate evidence, in that behalf, offered by the defendants, gave the following declarations of law, which drove the plaintiffs to a non suit:

"The court, of its own motion, declares the law to be, that if defendants, or those under whom they claim, entered upon a tract of land, embracing the premises described in the petition herein, in the year 1846, claiming to own said tract under, and by virtue of, a deed purporting to convey the same to them in fee, and in that year enclosed said tract with a fence, and improved and cultivated said tract, and occupied said tract, (or the portion thereof described in the petition,) so enclosed and improved continuously from that time, under such claim of title, up to the time of the death of Abner W. Dyer, on or about the 25th of June, 1870, and for three years next after his death, and before the original petition in this case was filed, the plaintiffs are not entitled to recover." After an unsuccessful motion, to set aside non suit, the plaintiffs took the case, by writ of error, to the St. Louis Court of Appeals, where the ruling and judgment of the circuit court was affirmed; from which the plaintiffs bring the case here by writ of error.

From this record it appears, that the plaintiffs claim the property in question as the heirs of their mother, who, at and before 1846, when the

adverse possession, under which the defendants claim, first commenced, was the owner in fee of said real estate, and a married woman, with issue born alive of that marriage; that the said marriage continued until 1869, when it was dissolved by the death of the mother; that the father survived the mother and died in 1870; and that this suit was commenced in 1878, and within ten years after the death of the father; but not until thirty-two years after said adverse possession had commenced, and thirty-one years after the date of the present statute of limitations of 1847, and more than three years after the death of their father. The defense, is the 24 years statute of limitation. Under this state of facts, the only question is, are the plaintiffs barred of their right of action, under a proper construction of the statute of limitation of 1847, invoked by defendants, for their protection.

The 1st section of that act, now section 3319, of the Rev. of 1879 on its face declares, in substance, that no action for the recovery of lands, or the possession thereof, shall be commenced, had or maintained, by any person whatever, unless it appears, that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims, was seized or possessed of the premises in question within ten years before the commencement of such action or suit.

(But it may be remarked at the outset, that, by common consent, the proper construction of the statute is, that, notwithstanding the sweeping language of the 1st Section of the act, no person is embraced in, or contemplated by the 1st, or any subsequent section of the statute, except such as have a present-existing right to commence an action or make an entry. Dyer vs. Brannock 66 Mo., page 422—Johns and Wife vs. Fenton, not yet reported—Harris and Wife vs. Ross, not yet reported.)

Section 4, now section 3222 of the Rev. 1879, declares that, "If any person entitled to commence any action in this article specified, or to make an entry, be, at the time such right or title shall first descend or accrne, either within the age of twenty-one years, or insane, or imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any time less than life, or a married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this article limited, for the commencement of such action or the making such entry; but such person may bring such action or make such entry after the time so limited, and within three years after such disability is removed:—provided, that no such action shall be commenced had or maintained, or entry made, by any person laboring under the disabilities specified in this section, after twenty-four years after the cause of such action, or right of entry shall have accrued."

Section 3224—Rev—1879, reads that: "If any person, entitled to commence such action or to make such entry, die during the continuance of any disability specified in section three thousand two hundred and twenty-two, and no determination or judgment be had of the title right of action to him accrued, his heirs or any person claiming from, by or under him, may commence such action or make such entry after the time in this article limited for that purpose, and within three years after his death, but not after that period."

The question before us, it may be remarked, is determinable, of course, by the state of the common law, as it stood, at that date, unaffected by subsequent statutes limiting the common law rights of the husband in the fee simple estates of the wife. The material and decisive question, for determination, in this case, therefore, is, to whom, by the common law, as it stood at that date, did the right of action or cause of entry accrue, by reason of the adverse possession, or disseizin, under which the defendants claim title.

The solution of that question depends upon another, to wit; who, under the law and the facts had, or was entitled to, the seizin and possession of the premises, when the adverse possession first commenced. The Court of Appeals, in their opinion affirming the ruling and judgment of the circuit court, held that the case was governed by that of Valle vs. Obenhause 62 Mo., 81, as modified and explained by Dyer vs. Brannock 66 Mo. 391 and 442, adjudicating upon this very title. 14th Mo. Appeal Reports 52.

That case (Valle vs. Obenhause) held, that "The husband is understood to be jointly seized of his wife's estate, and during the existence of coverture he is not tenant by the curtesy, but only seized by right of his wife, and if there be a disseizin, it is of the joint estate, and they must jointly bring an action to recover the possession. Under this view of the title of husband and wife in the lands of the wife, the statute of limitation will begin to run from the date of the disseizen against both." If that ruling be accepted as the present state of the law in this state on this question, the plaintiffs are unquestionably barred.

It has been something over ten years since the decision was rendered, and it has justly been esteemed an important one, and if, during all this time, its correctness has not been challenged, it should not now be lightly called in question. It becomes important, therefore, to consider, not only the case itself; but, also, how far, if at all and to what extent, it has since been questioned, modified or overruled.

In the first place it may be remarked, that the opinion in that case was that of a majority of the court—one of its members being absent, and another delivering a dissenting opinion to the effect "that the wife had no right of action or entry, after the disseizin, until the death of the husband, and that her grantee, the plaintiff, in that event was not barred by the statute of limitations."

It may also be added that one member of the majority placed his concurrence in that opinion

on grounds somewhat different from those stated in the opinion proper. It may be further remarked that the case, when decided, was regarded by the court as a new one in regard to the proper construction of our statute of limitations, and for that reason, as well as its own merits, was carefully considered by the several judges in their respective opinions. In that of the court proper, as well as that of the dissenting judge, the two "opposing theories" are elaborately discussed, and numerous authorities cited in support of the respective positions. So that but little, if anything, remains to be said on the question itself beyond a few remarks, the citation, perhaps, of some additional authorities, and a consideration of subsequent decisions of this court, in which the question itself, or the legal propositions on which the question at issue rests, are stated and recognized with more or less distinctness, or else more elaborately considered, and in one case, at least, where the Valle & Obenhause case is directly questioned, and its construction of the statute of limitations in this behalf expressly questioned.

The Valle-Obenhause case itself, in speaking of the effect of the tenancy by the curtesy of the husband upon the wife's seizin and possession of her fee simple estate, concedes that "It is clear that if a wife has a mere reversion, the statute does not bar her, uhtil her reversion vests by the death of her husband, since in such cases her right of action only commences on the termination of the particular estate."

The court then remarks, "Where a particular estate has been created by the husband, whether with or without the consent of the wife, the wife or her heirs cannot sue until its determination." The error in this is, that the creation of the particular estate is the act of the marital law, and not of the husband's deed; the latter simply transfers what the former creates. Under the facts and authorities the seizin and possession of the wife, by operation of the marital law, is transferred to the husband during his life, consequently no right of action accrues to her or her heirs until his death, and in such case the wife is not within the purview of either the 10 or 24 year provisions of § 3222, since she is not in the language of that section entitled to commence an action or make an entry. In such case no cause of action whatever accrues to the wife until the husband's death.

The question of the right of action depends upon the fact and right of seizin or possession. Whoever is entitled, under the law, to the possession, "*ex necessitate*" is entitled to the right of action, As was well said in the dissenting opinion in the Valle-Obenhause case, *supra*, the statute of limitations (§ 3222), does not undertake to determine who is, or is not entitled to commence an action, or make an entry, but simply provides within what period such person, so entitled, shall commence their action or make their entry. That question is determinable solely by the common law applicable to the facts of the case.

It may be conceded, also, as claimed in the concurring opinion in that case, that the statute was designed to operate with uniformity, and exclude all alike, whether infants, *femmes coverts*, insane persons, etc., after the lapse of 24 years from the date, when the right or title contemplated shall have first accrued.

"If, (as elsewhere said, in said concurring opinion, in speaking of the right of action), it has descended or accrued, then by the express proviso of the statute, 24 years, even in the case of a married woman, makes a complete bar." But the question remains, has the right in question under the law and the fact so accrued? If it has, it is unquestionably barred; but otherwise, not.

It is true, that infants, insane persons, prisoners and married women, are all grouped together in § 3222, and are all to be treated alike—as barred by its provisions whenever they are alike entitled to sue, but only when so entitled. There is a marked difference in the effect which the several disabilities therein mentioned have upon the subjects thereof, at least, so far as the married woman is concerned.

It must be remembered that, as to infants, insane persons and prisoners, their several disabilities have no effect to displace or suspend their seizin or possession of their real estate.

Not so in the case of a married woman. Her disability of coverture, by its own force, under the marital law, operates to transfer her seizin and possession of her fee simple estate to her husband, and with it the consequent right of action. This important difference, so far as a right of action incident to a disseizin is concerned, seems to have been overlooked, both in the opinion of the court and that of the concurring opinion.

But passing from that decision, the next case in which this question came before the court, is that of Dyer v. Bannock, 66 Mo. 420 to 423, and especially 422, which appears to be an adjudication upon this very title involved in this case. 14 Mo. Appeal, 54 and 2nd Mo. Appeal, 432. The opinion in this case, as I understand it, seriously impairs, if it does not virtually overrule, that in the Valle-Obenhause case. While it, in terms evidently recognizes the ruling in that case; yet, it states, with much distinctness and clearness, and with apparent approval, the general leading legal propositions announced as the basis of the dissenting opinion in that case. It appears to me difficult, if not impossible, to reconcile the two cases. It is there stated, that "it is generally understood that the statute of limitations does not run against any one who has no right of possession." It is there also said, speaking of the husband, that "So long as he lives, his life tenancy, whether outstanding in a third person, or remaining in him, effectually prevents any action or entry by his heirs." It is there further said, "This would be the result, whether the husband, during the life of the wife, had transferred his estate to

some third person by deed, or it has passed to an adverse possessor."

It is also there said, in speaking of the instruction of the trial court in that case, that "The objection to this instruction is, that the tenancy by the curtesy of A. W. Dyer, consummate on the death of his wife, is entirely overlooked. Mrs. Dyer died in 1869, before the bar of 24 years had elapsed. Her estate, not having been barred by the statute of limitations, on her death passed to her heirs. Her heirs, however, could not sue on her death, because her husband survived her, and they had no right of entry or action during his life estate. If the statute of limitations is construed to run against them from the death of the mother, it operated against parties who had no right of action, and who would have been trespassers had they undertaken to enter. Indeed, upon this construction of our statute, had the husband lived three years or more after the death of the wife, the title of the heirs would be wholly destroyed, since they cannot sue during the continuance of the particular estate, and before its determination the three years from the death of the mother have gone by." It is also stated in said opinion, that, "The person barred by the statute is one whose right of entry has accrued, and who neglects to sue during the three years alloted after his right of action accrues." The opinion then winds up with this remark—"Whether, in the event the suit had not been brought within three years after the death of the husband, the heirs would have been barred by an adverse possession of ten or thirteen years, as was held by the Court of Appeals, is of no practical importance in the case. It is unnecessary to give an opinion on this question until such a case arises." And just that identical case has arisen on this record, and upon the same title, and we are now called on to decide what was there waived.

In the case of Kanaga & Wife v. St. L., etc. R. Co., 76 Mo. 214, the court states the common law rights of the husband in the wife's fee simple lands, in the following pointed language: "The husband, during the marriage, has the exclusive right to the possession of her real estate, not held to her sole and separate use, and is the only proper party plaintiff in a suit to recover the possession thereof." If this be true, the ruling in the Valle-Obenhause case, *supra*, cannot be correct.

In the still later case of Gray and Wife v. Dryden, 79 Mo. 106, Commissioner Martin uses this equally pointed language: "This was an action for an injury to the actual possession of real estate. The possession of the wife was the possession of the husband. I do not well see how their possession can be joint or common under our law. Certainly this is not so in respect to her general real estate, which is placed by the law in the exclusive possession of her husband. Where he is in possession of it, the fact that she is on it with him, gives her no possession, any more than to any other member of his family, whose actions are subject to his control. She is not in joint possession with him, because she is there; and she is not a necessary party to any suit to vindicate the possession against trespassers and wrong-doers."

In a still later case, that of Mueller & Wife v. Kaessman, 84 Mo. 318, 332, 330, it was held, that "in this State a wife is not a necessary party to an action of ejectment by the husband for her lands." The leading question, however, in that case was, as to how far and to what extent, the common law rights of the husband in the real estate of the wife, were changed, modified or abolished, by § 3295, Rev. Stat. 1879, first enacted in 1865. In the discussion of that question, the common law rights of the husband, anterior to that statute, are stated at page 324 in the following language: "What were the rights of husband at common law in the land of the wife? These. He was jointly seized with her of that land: had *jure uxoris*, the exclusive right to the possession of that land, its rents and profits; could make a tenant to the *præcipe*; could lease or mortgage by his own deed alone; or by his deed, without joining his wife with him, convey his marital interest in the land, which conveyance would be good during their joint lives, and his freehold estate might be seized and sold on execution." At page 330 this further language is used: "At common law it was necessary for the husband to join the wife with him in an action to recover the real estate of the wife, * * * * and if the common law rule has not been abrogated by our code, it would seem that she must be joined. It has, however, been otherwise decided in this State, the husband being regarded as the only necessary party plaintiff in actions for the recovery of her lands." Citing Gray v. Dryden, 79 Mo. 106; Cooper v. Ord, 60 Mo. 420, and cases cited.

This case, also, says the Kanaga Case, 76 Mo. 207, in so far as it conflicts with the views therein expressed, should be no longer adhered to. But this, as I understand the case, does not affect, or overrule, anything therein said as to the common law rights of husband and wife anterior to the enactment of the statute (§ 3295) limiting such rights, but only his rights to his wife's land, since the passage of the statute under construction.

In a still later case, that of Harris and Wife v. Ross, not yet reported, this language is used: "It is of the essence of the statute of limitation not to run against a party until a right of action has accrued to such party. The statute strictly speaking, it must be remembered, whether expressly or by analogy, deals only with the rights of action, and when there is no such right there can be no bar. In such case there is nothing for the statute to operate upon, or to set the same in motion. * * * * Sec. 3222 of the statute of limitations, by its terms, deals only with persons entitled to commence an action or make an entry; and § 3224 of same act has no application to the heir of a person not thus entitled.

In the late case of Campbell v. Laclede Gas Co., 84 Mo. 352, and pages 376 and 7, the commissioner, after showing that the plaintiffs are clearly barred by the ten year statute of limitation, adds this further paragraph: "Under the rule approved in Valle v. Obenhause, 62 Mo. 81, the plaintiffs would be barred by the absolute limitation of twenty-four years, which runs through all these disabilities, excepting only the suspension of the right to sue by reason of an existing tenancy by curtesy."

This, at least, is a recognition, by the commissioner who wrote that opinion, of the rule laid down in the Valle-Obenhause Case.

The authority of that case, so far as this one is concerned, however, may well be questioned for two reasons: 1st. As it appears that the plaintiffs were clearly barred by the ten-year law, it would seem that there was nothing left for the twenty-four year proviso to operate on, and its potency was not at all needed, as it only operates when the ten year law fails to destroy plaintiff's title. 2nd. As it appears that the disability under which the parties labored, through whom the plaintiff's claimed at the time the adverse possession was first taken, was that of infancy, and not coverture, as in the case at bar.

Their subsequent disability of coverture would afford no protection as cumulative disabilities are not allowed. But, be this as it may, the commissioner evidently recognized the authority of that case.

To this opinion of the commissioner there is a concurring opinion of a member of the court, concurred in by three others of the judges, to the effect that "while he concurred in holding the plaintiffs to be barred, it was not upon the authority of that case; and he desired to add to what he had heretofore said in his dissenting opinion (62 Mo. 90), that a statute which deprives a married woman of her property, for failure to sue for it in twenty-four years, when, during all that time, she had no right to the possession, and could not, therefore, maintain an action for such possession, was, in his opinion, plainly unconstitutional. The construction given to the statute, by a majority of the court in that case (62 Mo.), could not, therefore, be the correct one."

This concurring opinion is, at least, a declaration to the effect that the rule laid down in that case is not the law. It is, however, proper to say of this concurring opinion, as was said of the opinion of the commissioner, that its authority also may be equally questioned for the same reasons.

The last case, in which reference is made to the ruling of the Valle-Obenhause case, 62 Mo. 81, is that of Johns and Wife v. Fenton, not yet reported, which was a suit by the wife and her second husband for the admeasurement of dower in the real estate of her first husband. The doctrine of that case, as I understand it, in treating of the scope and operation of the statute of limitations, is to the effect that "the right limited is a present, existing right of action or of entry; that the wife's right to dower is not of that sort, and for that reason not barred by the statute, and that it is obvious, that cases like "Valle v. Obenhause, 62 Mo. 81, can have no application to such a case. This manifestly is the correct doctrine. The court, then, speaking of the assignment of dower, holds, that the statute begins to run from the period of its assignment, and if assigned before her second marriage her right of action would be barred in ten years. If, after that marriage, then, by the period of twenty-four years—citing Valle v. Obenhause—conceding, without admitting, that that might be true; yet it is obvious that such a case is not in point, and would be no authority in support of the ruling in the Valle-Obenhause case, for the reason, if no other, that the wife's real estate in the case supposed, is not an estate of inheritance, to which the husband's tenancy by the curtesy could attach, or interpose, as in that case, and in the one at bar. This case, therefore, has no application, and is not an authority in the case at bar.

The law on the question at issue is well stated in strong and pointed language in "Sedgwick & Wait on Trial of Title to Land," at page 117 and 118, § 219, where it is said: "A tenant by the curtesy initiate may sue alone for the possession of his wife's land, and for damages for withholding it * * *. At common law the husband's interest in the estates of which the wife was possessed at the time of the marriage, was a freehold, he alone having the right of entry, and the present right of exclusive enjoyment. The wife could not recover the lands from a stranger, even though her husband was joined as defendant, and disclaimed title and admitted the wife's right to possession."

To the same effect, also, is the case of Clark v. Clark, 20 Ohio State Reports, 128, where it said, that during coverture the right of possession of the wife's fee simple lands is in the husband, and the wife cannot maintain an action to recover the same from a stranger.

Wilson v. Arentz, *et al.*, 70 N. C. 670, is also a case in point. In that State it seems they have a statute substantially like § 3295, Rev. of —79, and it was there held that, "A tenant by the curtesy initiate has a right to sue alone for the possession of his wife's land, and for damages for the detention of it, * * * and the fact that the Act of 1848 (Battle's Rev. Code § 33) deprives him of the power to lease the land without the consent of his wife, will not prevent his recovery of the land by action, under C. C. P., without joining his wife as a party."

To the same effect is the case of Bledsoe v. Sims, 53 Mo. 305, and Kanaga v. St. Louis, L. & W. R. Co. 76 Mo. 207; See also Cooper v. Ord, 60 Mo. 421, 430.

In the North Carolina case of Wilson v. Arentz, *et al.*, *supra*, it is said, that "For an injury done

to the inheritance, his wife must have joined in the suit; for a trespass to the possession, he could sue alone."

This, I apprehend, is the true criterion for determining, when the wife is, or not, a necessary or proper party to a suit affecting the wife's fee simple lands.

The objection, that the construction here given § 3222 of the statute of limitations, renders the same nugatory and senseless, so far as a married woman is concerned, is not, we think, well taken. A married woman during coverture may have a right of action for an injury done to the inheritance or integrity of her fee simple lands; or to the possession of her sole and separate estate in lands from which the husband's marital rights are excluded, just as any other person, and these rights of action of hers and others of a like character, are just as much within the operation of that section as any other of the parties therein named. Whenever and wherever she has a right of action during coverture, she is as fully within the operation of that section—24 years and all—as any other party therein mentioned, and equally barred, whenever they are barred. This objection therefore, is without force or merit, and is fully met and refuted in the dissenting opinion of Judge Hough in the case of Valle v. Obenhause, 62 Mo. 81, and the argument need not be here restated.

The contention and point in judgment in this case is, that the wife during coverture, by reason of the husband's curtesy *initiate*, has no right of action, and that after her death her heir had none by reason of the husband's curtesy consummate prior to his death, and for these reasons the plaintiffs are not barred by the statute of limitations.

Adopting the views expressed in the dissenting opinion of Judge Hough in the case of Valle v. Obenhause, 62 Mo. 81, and of the authorities there cited; as well as in consideration of the views expressed in the subsequent decisions of this court hereinbefore mentioned, and the additional comments, reasons and authorities herein given and cited, we hold, that the ruling of the court in that case is not the correct one, and its authority in that particular is hereby overruled.

This leads to the conclusion that, upon the facts of this case, the plaintiffs herein are not barred of their right of action, and for these reasons the judgment of the St. Louis Court of Appeals is reversed and the cause remanded for further proceeding in conformity to the views here expressed. All concur, except Sherwood, J., who dissents.

NOTE.—Statutes of Limitation formerly were not favorably regarded, but this is no longer the case, for they are recognized to be statutes of repose.[1] In consideration of purely equitable rights, courts of equity act in analogy to statutes of limitation,[2] but only feel bound to apply such statutes in cases where their jurisdiction is concurrent with that of courts of law,[3] and will not follow them when manifest wrong would be produced thereby.[4] When the statute once begins to run, no subsequent disability will stop it.[5] When it is provided that the statute shall not run in case of certain disabilities, it is held, that the disability must have existed when the right of action accrued; a party cannot avail himself of a succession of disabilities.[6] Such statutes generally are considered to have only a prospective operation in the absence of any provisions to the contrary.[7] Statutes, extending the time for bringing suits, will not be construed to revive actions already barred.[8] It has been held, that when a cause of action has been barred by the statute, it cannot be revived by statute nor by constitutional amendment.[9] In a late well considered case it was held, that the bar could be removed as to a debt, but not as to a claim for specific property.[10] Such statutes must be so construed as to effect the legislative intent,[11] which must not be evaded by construction.[12] If the language is clear and free from ambiguity, it should be applied as expressed, although the consequences in a particular case should appear harsh;[13] but when the law is doubtful, it should be construed in favor of imperiled rights rather than prejudicially thereto.[14] The disability clauses in such statutes exempt the disabled from the necessity of suing, still they are at liberty to sue if they wish.[15] The decision of the court in the principal case settles the construction of the Missouri law, but does it reflect the legislative intent? They say that § 3219 only applies to cases where there is a present existing right to commence an action or make an entry. This present existing right must refer to the period of the beginning of the adverse possession or disseizin. If not so, in what sense is the term used, and how can the section be read in connection with any other meaning? They say subsequently, quoting the language of Harris v. Ross, that § 3222 also only applies to persons who have a present right of action or of entry, and § 3224 has no application to the heir of a person not so entitled. They also say there, that the statute deals only with rights of action, and where there is no such right no bar can exist. In the principal case

1. McCluny v. Silliman, 3 Pet., 270; U. S. v. Wiley, 11 Wall, 508; Phillip v. Pope, 10 B. Mon. 163; McCarthy v. White, 21 Cal. 495; Dickinson v. McCamy, 5 Ga. 486; Elder v. Dyer, 26 Kan., 604.

2. Hall v. Russell, 3 Sawy. 506.

3. Etting v. Marx's E. 4 Hughes 312.

4. Fogg v. St. Louis R. R. Co., 17 Fed. R. 871.

5. Harris v. McGovern, 99 U. S. 161; Rogers v. Hillhouse, 3 Conn., 398; Daniel v. Dav, 51 Ala., 43; Swearingen v. Robert on, 39 Wis., 462; Mercer v. Selden, 1 How. (U. S.) 37; Tracy v. Atherton, 36 Vt. 503.

6. Hogan v. Hurtz, 94 U. S. 773; Butler v. Howe, 13 Me., 397; Keeton v. Keeton, 20 Mo., 530; Fritz v. Joiner, 54 Ill., 101; Reimer v. Stuber, 20 Pa St. 458.

7. Ward v. Kilts, 12 Wend. 137; Central Bank v. Solomon, 20 Ga., 408; Pitman v. Bump, 5 Oreg, 17; Stine v. Bennett, 13 Minn. 153; Martin v. State, 24 Tex. 61; Thompson v. Reid, 41 Iowa 48.

8. Robb v. Harlan, 7 Pa. St. 292; Garfield v, Bemis, 2 Allen 445; Wires v. Farr, 25 Vt., 41.

9. Girdner v. Stephens, 1 Heisk, 280; Yancy v. Yancy, 5 Heisk, 353; Rockport v. Walden, 54 N. H., 167.

10. Campbell v. Hott, 115 U. S. 620.

11. Gorman v. Judge of Newaygo Circuit, 27 Mich., 138; Gautier v. Franklin, 1 Tex. 732.

12. U. S. v. Wilder, 13 Wall., 254; Roberts v. Pillow, Hempst., 624.

13. Fisher v. Harnden, 1 Paine (C. C.) 55; Arrowsmith v. Durell, 21 La. An. 295; Amy v. City of Watertown, 22 Fed. R. 418.

14. Elder v. Bradley 2 Sneed, 247.

15. Piggott v. Rush, 4 Ad. & El. 912; Milliken v. Marlin, 66 Ill., 13; Chandler v. Vilett 2, Saund., 120.

neither the wife nor the plaintiffs, her heirs, had any right of action or entry when the adverse possession began; so under this decision the limitation law does not apply to them. Then under what law was this case decided? It will not do to say that this law becomes of force when a right of entry accrues, for the words of the law would still remain, that the ancestor must have been seized within ten years before the suit is brought. Whenever the law operates, it does not say you must begin your action within ten years after you have a right of action, but merely says your ancestor must have been seized within ten years before you bring suit. In the case at bar the conclusion reached is no doubt equitable, but has the court endeavored to ascertain the intent of the legislature? We believe the lay mind [and our legislators may be presumed to be such], intended to make an absolute bar in all cases after twenty-four years, and the prior decisions in this State look as though the legal mind was much of the same impression.[16] Query, did the legislature design a distinction between right of action and right of entry, considering the first solely relative to the act of disseizin and the latter relative to the dispossessed, and make the existence of either state of affairs for twenty-four years an absolute bar?

S. S. MERRILL.

16. Dyer v. Brannock, 2 Mo. Ap. 443.

OFFICIAL BONDS—SURETIES—STRICTISSIMI JURIS—CONDITIONAL DELIVERY.

TRUSTEES OF SCHOOLS ETC. V. SCHEIK.*

Supreme Court of Illinois, October 5, 1886.

1. Suit on school treasurer's bond, signed by sureties but not signed by principal obligor. Suit was against the sureties. Among the facts found by the trial judge was that the bond was signed by the sureties upon the agreement, between them and the principal obligor, that he would not deliver the bond until he had signed it, which agreement he violated.

2. *Held*, that the sureties were liable for the defalcation, and that the agreement did not amount to a conditional delivery of the bond.

This case was brought by the appellants in 1876, in the Circuit Court of Will County, on a township treasurer's bond, against the principal in the bond and his sureties. The case was first tried before Hon. Josiah McRoberts. On the trial it was for the first time discovered that the bond was not signed by the principal in the bond; his name appeared in the obligatory part of the bond only. The court gave judgment against the principal obligor and his sureties. The cause was appealed to the Appellate Court, Second District, which court reversed and remanded the same on account of variance between the bond sued on and the bond introduced in evidence. See 3 Bradwell, 448.

The case was redocketed, suit dismissed against the principal in the bond and amended *narr.* filed. The sureties on the bond prayed *oyer* of the bond and demurred. The cause was argued before the Hon. Francis Goodspeed, judge of the Will Circuit Court. The court was of the opinion that the bond was so incomplete as to be a nullity and no action could be maintained thereon, and sustained the demurrer. An appeal was taken to the Appellate Court, which court *held*, where the declaration upon the official bond alleged that the defendants, as sureties, signed and delivered such bond to the plaintiffs as their bond, it is sufficient on demurrer, although it appeared that the bond was not signed by the principal obligor, and reversed and remanded the same. See 10 Bradwell, 51.

The case was afterward tried before his Honor George W. Stipp, at the Will Circuit Court, without a jury, who found for the plaintiffs and entered judgment. An appeal was again taken to the Appellate Court, which court held, under the facts found by the trial judge, the bond was signed by the sureties upon the express condition that it was not to be delivered until it was signed by the principal obligor in the bond; and no cause of action should be maintained on the bond, and reversed the case. For the opinion, see 16 Bradwell, 49, from which decision an appeal was taken to March term, A. D. 1885, of the Supreme Court. The following opinion of the Supreme Court was filed Oct. 5, 1886, reversing the Appellate Court's last decision.

James Frake and *B. W. Ellis* for Appellant; *Messrs. Hill & Dibell* and *Messrs. Healy & O'Donnell* for appellees.

CRAIG, J., delivered the opinion of the court:

This was an action of debt brought by the Board of School Trustees against the appellees upon the bond of Phillipp Reitz, a defaulting school treasurer. In the Circuit Court the plaintiffs recovered a judgment, but on appeal the Appellate Court reversed the judgment and decided that no action could be maintained on the bond against the trustees, and under this ruling no remaining order was entered. The bond was never executed by Phillipp Reitz, the principal, although his name was inserted in the condition and obligatory part of the instrument. It was properly executed by appellees as sureties, and was accepted and approved by the Board of School Trustees. Much reliance seems to be placed in the argument upon the finding of facts as incorporated in the judgment of the Appellate Court, it being claimed that the court found that appellees signed the bond upon the condition that it should not be delivered until it had been executed by the principal. We do not so understand the finding; the Circuit Court has found the facts and recited in the record what that finding was, and this seems to have been adopted and sanctioned by the Appellate Court. Upon an examination of the Circuit Court it will be seen that the court found from the evidence that Reitz promised the sureties that he would sign the bond

*S. C. Chicago Legal News Vol. 19, p. 32 October 9th, 1886.

before it was delivered. This, however, does not constitute the execution of a bond upon condition that it should not be delivered unless executed by the principal. Indeed, the sureties seemed to rely upon the promise of Reitz and not upon a conditional delivery, as is apparent from the finding of facts by the Circuit Court and from the decided weight of evidence. It is also said that the liability of appellees should be construed strictly. The general rule is that the undertaking of a surety is to be construed strictly; he is only bound in the manner and to the extent set forth in the obligation executed by him: Cooper v. The People, 85 Ill 417. But adhering to this rule to its ultimate limit, are the sureties liable on the obligation which they executed? The statute required this bond to be executed and delivered to the trustees for the purpose of keeping secure the public funds and for the purpose of guarding against a public loss. In view of this fact, while we regard it proper to adhere to the rule of law indicated above, still, a surety who has incurred an obligation of this character should not be allowed to escape liability upon a mere technical defect in the obligation he may have executed, which does not go to the substance of his undertaking. Keeping the principle in view, we will examine the principal objections urged against the validity of the bond upon which the action is predicated. It is claimed that where the name of an intended co-obligor appears upon the face of a bond, who has not executed it, the instrument is imperfect and not binding. The decisions of the courts of the different states are not harmonious in regard to the binding effect of a bond upon the rights of sureties where the bond has not been executed by the principal. In Bean v. Parker, 17 Mass. 603, where an action was brought against the sureties on a bail bond which had not been executed by the principal, the court held that no action could be maintained. It is there said: We think it essential to a bail bond that the party arrested should be a principal; it is recited that he is; and the instrument is incomplete and void without his signature. In a later case, Russell v. Anable, 109 Mass. 72, where the principals on a bond constituted a firm, and the firm name was signed by one of the partners, the court held that the surety was not bound unless it appeared that the partner who signed the firm name had authority from his partner to do so. In Wood v. Washburn, 2 Pick, 24, an administrator's bond not executed by the administrator was held not to be binding on the surety. In Fery v. Burchard, 21 Con. 602, a similar question arose, and the court held that a contract of a surety was of such a nature that there could be no obligation on his part unless the principal was also bound. In Brown v. Jetmore, 70 Mo. 228, a late case, and one, too, quite similar to the one before us, the sureties on a constable's bond were held not liable for a default of the constable upon the sole ground that the bond had not been executed by the principal. There are other cases holding a like view, and there are others which hold that the sureties may be held liable, although the principal did not execute the instrument. State of Ohio v. Bowman, 10 Ohio, 445, was an action on a treasurer's bond. The principal's name was in the body of the bond but he did not sign the instrument; the sureties defended on the ground that the principal had not signed it, but the court held that they were bound. Loew, Admr. v. Stocker, 68 Pa. 226, was an action against sureties on a bond of indemnity; the principal's name had been signed without authority; on the decision of the case it was said: Had the bond not been executed at all by the principal, though his name was mentioned as one of the obligors in the body of the instrument, it is clear that the surety could not avail himself of this fact as a defense. Herrick v. Johnson, 11 Metcalf, 34; Keyes v. Keen, 17 Tenn. 330; Haskins v. Lambert, 16 Me. 142; Grim v. School Directors, 51 Pa. St. 219; Williams v. Marshall, 42 Barb. 524; Miller v. Turnis, 10 Upper Canada, 423, announce a similar rule.

The Supreme Court of Michigan does not seem inclined to adopt the rule established in either class of cases cited above, but seems disposed to adopt a medium ground.

Johnson v. Township of Kimball, 37 Mich. 590, is a case in its facts quite similar to the one under consideration. There, as here, the suit was against the sureties on the official bond of a defaulting treasurer; the bond was drawn setting out the name of the principal and sureties, but it was never executed by the principal. In the decision of the case the court said: Our statute plainly contemplates that the treasurer shall himself be a be a party to his own official bond. And while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of the opinion that where he purports to be obligor and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature, before they can be held responsible. See, also, Hall v. Parker, 39 Mich. 287, where the same doctrine is announced.

We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts that a bond signed by the sureties without the signature of the principal, may not be binding upon those who execute it, as was held in the case cited from Missouri and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality which ought not to affect the rights of any of the parties concerned. In what way are the sureties injured by the omission of the principal obligor to sign the bond? If they are compelled to pay the trustees any sum of money on

account of the default of the treasurer they can recover the amount back from him whether he signed the bond or not; so far then as they are concerned they are in as good position as if Reitz, the treasurer, had properly executed the bond. If Reitz is insolvent, a judgment in favor of the trustees against him could be of no benefit to the sureties; if, on the other hand, he is solvent, the sureties can collect from him whatever sum they may be required to pay in consequence of executing the bond. If the bond had been signed by the sureties upon condition that it should not be delivered to the trustees until executed by the treasurer, and if the trustees had received notice of such condition, or notice of such facts pointing to such a condition as might put a prudent person on inquiry before the bond was approved, then they could not be regarded as innocent holders of the instrument, and entitled to maintain an action upon it. But the sureties, as appears, did not sign the bond on such a condition, but executed the instrument and relied merely upon the promise of the treasurer, that he would before delivery of the bond sign it. This was no more than a secret promise made by Reitz, the treasurer, to those who signed as sureties, which could not be binding upon the trustees. They had no notice of the arrangement existing between the treasurer and the sureties, and they ought not to be affected by it.

In Smith v. Peoria County, 59 Ill. 414, where an action was brought upon an official bond against one of the sureties, he set up as a defense that he signed the bond on condition that it should also be executed by one Cox as co-surety, before it should be delivered; that Cox failed to execute the bond; that, in violation of the agreement, the bond was delivered without his knowledge or consent. On demurrer to pleas, in which this defense was set up, the matters alleged were held not to constitute a valid defense to the action on the bond; but other pleas in which the same facts were a set up, and also that the plaintiff had notice, were held to constitute a valid defense to the action. Under the ruling in the case cited, if the bond in this case was signed by appellees upon condition that it was not to be delivered until executed by the principal, and the trustees at the time they accepted and approved the bond had notice, no action could be maintained on the bond; but, as said before, no such defense was made out. The judgment of the Appellate Court will be reversed and the circuit court will be affirmed. The cause remanded to the circuit court for further proceedings in conformity to this opinion.

Reversed and remanded.

SCHOLFIELD, J., dissenting.

NOTE—The rule that the liability of a surety is *strictissimi juris* is well established, but like other rules of law must be reasonably construed, especially when it comes into collision, real or apparent, with other rules of law equally beneficent. Such a rule is, that when one of two innocent parties must bear a loss from the act of a third person, it must fall upon the one who enabled that third person to cause it. Sureties, therefore, who entrust their principal with a bond signed by them for delivery to the obligee, make him their agent and are responsible for his acts. In such a case the sureties are liable although their principal disregards their conditions and instructions, unless, indeed, the obligee is guilty either of fraud or rashness in accepting such a bond.[1] In a West Virginia case,[2] the sureties having executed the bond delivered it to their principal with instructions to get other sureties before delivering the bond. He disobeyed this instruction, but they were nevertheless held responsible. To the same effect is a Kentucky case,[3] and so also is a Virginia case,[4] and in Indiana the same doctrine has been held in two cases.[5] In Missouri there is a like ruling,[6] and in Vermont,[7] and in Maine.[8] In the Supreme Court of the United States the same principle has been recognized.[9]

It must be noted, however, that running through all these authorities there is a very material qualification of the broad doctrine that under the stated circumstances the surety is liable. "——— Unless, indeed, the obligee is guilty either of fraud or rashness in accepting such a bond;"[10] the same language appears in Lyttle v. Cozad,[11] and in Nash v. Fugate,[12] the court expresses the same limitation more fully. It says: "The instrument being complete in form, (precisely such as would have been adopted if the parties signing it were alone to be bound,) being found in the possession of the very person who would have held it if the purpose had been to make an unconditional delivery: under such circumstances an obligee accepting has the right to infer that the transaction is precisely what it purports to be, and that the real power is in fact co-extensive with the apparent power." And just here we may remark that in the principal case the instrument was not "complete in form," but, upon its face, was incomplete.

In State v. Pepper,[13] the court holds that the obligee is not bound by the condition unless he has notice of it, or of circumstances which should put him upon inquiry. In State of Maine v. Peck,[14] it seems to be stiputated that the bond must be perfect on its face, and that the obligee must have no notice of any condition, or of anything to put him on inquiry. And in each of the other cases cited, there will be found clauses which indicate clearly that the obligee must be, in a legal sense, a strictly innocent party.

There can be no doubt that when the obligee is, in a legal sense, a strictly innocent party; and the instrument is complete in itself, and the obligee has no notice of any condition or agreement contrary to the validity of its delivery, nor any knowledge of facts which should put him on inquiry as to irregularities;

1. Murfree v. Official Bonds § 166.
2. Lyttle v. Cozad, 21 W. Va., 183, 199.
3. Smith v. Moberly, 10 B. Monr. 266; See also Bank *etc* v. Carey 2 Daua. 142; Millett v. Parker 2 Metcf. Ky., 608.
4. Nash v. Fugate, 24 Gratt. 202.
5. Deardorff v. Foreman 24 Ind., 481; State *ex rel.* v. Pepper, 31, 76.
6. State use &c v. Potter, 63 Mo., 212.
7. Passumsic Bank v. Goss, 31, Vt., 318.
8. State v. Peck, 53 Me., 284.
9. Dair v. United States 16 Wall (U. S.) 1.
10. Murfree on Official Bonds, *supra.*
11. *Supra.*
12. *Supra.*
13. *Supra.*
14. *Supra.*

the surety will be bound, however stringent a condition he may have imposed upon his principal as to the delivery of the instrument. The principal is certainly his agent for the delivery of the bond, not the agent of the obligee to procure it. But we think it equally clear that if the obligee is not innocent in the strictest legal sense, if he has notice of a condition attached to the delivery which has not been observed, or of facts which should put him upon inquiry as to such conditions; or, if the bond is not regular and complete, (which ought surely to put the obligee upon inquiry,) then the obligee is bound by the condition. As already stated, the cases which sustain the liability of the surety who has imposed conditions as to the delivery of the bond, also recognize his immunity if notice of the condition can be bronght home to the obligee, and there are other cases which directly sustain it. In a Virginia case,[15] a bond was drawn in which the names of the principal and four sureties were inserted, one of the named sureties did not execute it, and it appearing to the court that two of those who did sign it had stipulated for the signature of the whole number named in it, they were held to be released, and their release authorized the release of the third surety. And in a New Jersey case, it appeared that one of the parties to a bond at the time of executing, stipulated that it should not be delivered until all the parties named in it had executed it, the court held that as one of the parties named in it had not signed it, it could not be received in evidence.[16]

The rule of law governing this subject, we are persuaded, is that if a surety executes a bond and delivers it to his principal upon, a condition that another person shall sign it before delivery, and that other person does not sign it, the surety is bound, unless he can show that the obligee had notice of the condition upon which he had signed it, or of such facts and circumstances as should put a reasonably prudent man upon inquiry as to the existence and character of such condition. And we cannot conceive of anything more likely to put a prudent man upon inquiry in such a case than the fact that the instrument is incomplete, that a name is inserted in the body of the bond as an obligor which does not appear at the bottom of the instrument among the signatures of the obligors.

And when a party is put upon inquiry as to the facts of a transaction, he is charged with notice of everything which, by that inquiry, he could reasonably be expected to discover, and if he ascertains, or ought to have ascertained, that the obligor in delivering the bond has committed a fraud upon the surety, by violating his promise by accepting he became a party to that fraud, is no longer, in contemplation of law, innocent; and the fraud, so practiced by the principal and abetted by the obligee, lets in all the equities of the surety against either, and restores to its full force the rule that the liability of a surety is *strictissimi juris*.

ED. CENT. L. J.

15. Ward v. Churn, 18, Gratt. 801.

16. State Bank v. Evans, 15 N. J. Law. 155; See also Pawling v. United States, 4 Cranch (U. S.) 218; Bibb v. Reed 3 Ala, 38; King v. Smith 2 Leigh 157; People v. Bostwick 32 N. Y., 445.

WEEKLY DIGEST OF RECENT CASES.

1. ACCOUNT—*Settlements with Cestui que Trust—Probate Account—Evidence.*—Where a trustee under a will has made a settlement with A. and B., *cestuis que trust*, and afterwards rendered a probate account which has been allowed, in a suit against the trustee for an accounting, the settlements are to be upheld as evidence that, in casting interest, there should be a rest at the time of such settlements, and thereafter the interest or income should be computed on the amount found due. A. and B. in such settlement; and this is so although, when such settlements were made, they were false in their statements, and the trustee had not in his hands the property which he pretended to have, but had misappropriated it to his own use; and where at the time of the settlement with A. and B., the trustee rendered an account of the sum due C., another of the *cestuis que trust*, under the same will, such an account is evidence of what C.'s share then was, and in casting interest a rest is to be made as of the date of such account, and also another rest at the date when the sum due C. was payable *McKim Judge &c. v. Hibbard*, S. J. Ct. Mass., Sept. 16, 1886; 8 N. East Rep. 152.

2. ASSIGNMENT *for the Benefit of Creditors—Preferences—Fraud—Statute of Limitations—Lex Fori Governs—Conflict of Laws.*—When an insolvent debtor who has made an assignment for the benefit of his creditors secures a part of the creditors a percentage of their claims, and they then transfer them to a third party, so that the assignor can get a *pro rata* allowance when the estate is distributed, the claims will not be allowed. The statute of limitations only affects or bars the remedy, and the statutory bar of the state where the remedy is sought to be enforced, and not of the state where the contract is made, governs. *Farmers' etc Bank v. Lovell*, Ky., Ct. of Appeals Sept. 21, 1886: 1 S. W. Rep. 426.

3. ATTACHMENT—*Claimant—Equitable Title of Claimant—Appeal—Attachment—Bona Fides of Sale of Property by Debtor—Weight of Evidence.*—An equitable title to land attached, acquired prior to the levy of the attachment, is valid as against the attachment. Where, in attachment proceedings, there is an issue as to the *bona fides* of a sale of real estate by the debtor, and there is some positive proof that the transaction was genuine, and the trial court has so found, the appellate court will not order a new trial, unless the verdict is clearly against the weight of the evidence.

Brooks etc Co. v. Bush, Ky., Ct. App. Sept. 18, 1886; 1 S. W. Rep. 424.

4. BONDS—*Probate Bond—Discharge of Bond—Liability of Sureties.*—W., as trustees under the will of E., gave bond "A." with sureties. W., who was also trustee under the will of D., had given bond "B." on which J. was security. J. under a misapprehension that he was surety on bond "A." petitioned to be discharged from liability thereon, and, as a result of his petiton, the probate court decree his discharge as surety thereon. G. and H., supporting that J. was surety on bond "A," and wished to be discharged from further liability thereon, and supposing that there was no bond in force, signed a new bond, "C," as sureties; the bond being for the same liability as bond "A." The slightest examination would have shown that J. was under no liability on bond "A." *Held*, that both bonds "A" and "C" were valid and in force; that the sureties on each bond should be held responsible in proportion to the amount of the bonds, and the liability they had severally incurred; and that it could not constitute any defense to the sureties on bond "C" that, by reason of the validity of bond "A," their liability would be less than they intended. *Brooks v. Whitmore*, S. J. Ct. Mass., Sept., 8, 1886; 8 N. East Rep. 117.

5. CONFUSION—*of Goods—Sale—Notice.*—Floating logs distinctly marked are not subject to confusion or commixture of goods in the sense implied by those terms in law; and for their appropriation and turning them into money knowingly and without right, a party is liable to the owner; but it is not a case where defendant should be chargeable on account of the means of knowledge being particularly within his reach, and not within reach of the other party. On a promise by defendant "to settle and pay" for the logs appropriated, the question as to whether the parties referred to all the logs in controversy, or the number proved to have been purchased by the plaintiff, is to be found by the referee and not to be inferred by the court. Knowledge of a sale of logs to plaintiff would not necessarily imply knowledge of a transfer, by the seller, of his claim against the defendant for appropriation of other logs. *Goff v. Brainerd* S. C. Vt., Aug. 9, 1886; 2 N. Eng. Rep. 612.

6. CONTRACT — *Statute of Frauds — Evidence — Waiver.*—S. and R. were partners, and as such owned a starch factory and had unsettled dealings. In view of settlement, S. offered to sell out to R. for $250, if accepted before a certain time limited, and R. was willing to accept if he could raise the money. Within that time S. deeded to defendant, who, with knowledge of the facts, took a deed on a verbal condition that he would fulfill S.'s offer to R.; R. tendered fulfillment on his part, but the defendant refused. A bill having been brought to compel specific performance, the defendant did not plead the Statute of Frauds, but denied the contract and objected to the admission of oral evidence to prove it. The master received the evidence, but the defendant failed to file exceptions to the report. Held: (*a*) That all objections to the admission of testimony were waived. (*b*) That the contract was not void, that it was proved was enforceable, and that the orators were entitled to a decree. (*c*) That S. was a proper co-orator. *Shofield v. Stoddard*, S. C. Vt. Aug. 2, 1886, 2 N. Eng. Rep., 611.

7. CONTRACTS—*Moral Consideration—Subsequent Promise—Married Woman.*—A contract made by woman while married, which is void on account of her coverture, furnishes no consideration for her subsequent promise during widowhood. *Kent v. Rand*, S. C., N. H., July 30, 1886; 5 Atl. Rep. 760.

8. CORPORATION—*Legal Existence, how Questioned—Quo Warranto by Prosecuting Attorney.*—When parties in good faith attempt to organize as a corporation under a law authorizing such incorporation, and hold property and perform acts as a corporation, its legal existence can only be questioned at the suit of the state, instituted by the proper prosecuting attorney, and not by a private individual. *North v. State ex rel.* S. C. Ind., Sept., 14, 1886; 8 N. East. Rep., 159.

9. CRIMINAL LAW.—*Homicide—Trial—Circumstantial Evidence—Conviction—Sufficiency of Evidence—Excluding Every Other Hypothesis—Cumulative Evidence — Indictment — Several Counts—Verdict.*—Where it is sought to establish homicide by circumstantial evidence, the circumstances, when taken together, should be of a conclusive nature and tendency; leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offence charged. It is not sufficient that they create a probability, though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential that the circumstances, taken as a whole, and giving their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. Com. v. Webster, 5 Cush. 319. Evidence of distinct and independent facts of a different character, though it may tend to establish the same ground of defence, is not cumulative within the rule. Waller v. Graves, 20 Conn. 305; Baker v. French, 18 Vt. 460. Where distinct offences are charged in separate courts of an indictment, the jury must either return a general verdict of not guilty, or respond to each charge in their finding. Wilson v. State, 20 Ohio, 26; Williams v. State, 6 Neb. 334. *Casey v. State*, S. C. Neb. Sept. 22, 1886; 29 N. W. Rep. 264.

10. DEEDS—*Boundaries—Construction—Number of Acres Bounded—Number of Acres Stated in Deed—Covenant of Warranty—Statute of Limitations—Breach—Satisfaction — Assignment—Mortgage—Eviction—Outstanding Title—Deed—Proof of Ownership.*—The deed in questinn, after describing the other boundaties, was "west by Woodford line; supposed to contain 140 acres, more or less." This was followed by further description as being the same lands which were described in two mortgages therein specified. Then followed this clause: "Intending to convey the same lands, and no other, which passed to me by virtue of the foreclosure of said mortgages." *Held*, that the latter clause should not be treated as anything more than a reference to the mortgages and decree for further and more particular description. The fact that the land contained within the described boundaries was more than the amount stated in the deed—140 acres, more or less—cannot relieve the vendor from his covenant of warranty. When the boundaries describe the lands with certainty, they control the quantity, although stated incorrectly in

the deed; such statement of the number of acres being mere matter of description, and not a covenant on the part of the grantor. The statute of limitations is not a defense to a breach of a covenant of warranty, as such covenant runs with the land. The levy of an execution by plaintiff's creditor upon lands conveyed under a covenant of warranty, is not a satisfaction of the breach of such warranty; the grantor must make good the covenants of his deed. D. conveyed certain lands to P., with a covenant of warranty, and took a mortgage back on the same as security for part of the purchase money. Afterwards P. conveyed to B., with covenant of warranty, but excepted the mortgage which B. assumed. B. did not pay the mortgage, but conveyed to plaintiff by quitclaim deed, making no mention of the mortgage, which at that time was overdue. D. then foreclosed his mortgage, and no one redeemed. *Held*, that the plaintiff took the same right against D., on his covenant of warranty, that he would, had not P. mortgaged the land back to D.; that D.'s covenant of warranty was none the less broken by his taking a mortgage from his grantee to whom he covenanted, and the damages for its breach were none the less. A deed shows no title in itself in the grantor; and. in order that such title may constitute eviction, it must be accompanied either with proof of possession corresponding to the deed, or of title in the grantor. *Wilder v. Davenport*, S. C. Vt. Aug. 13, 1886; 5 Atl. Rep. 753.

11. *Trust Deed—Escrows—Will—Election by Widow—Estoppel—Decree of Partition—Co-Tenants.*—Where title is claimed under a conveyance from a trustee and the *cestui que trust*, an allegation that the deed giving them title and power to sell was never delivered, but was left with the trustee for safe-keeping, and subsequently delivered up and canceled, is a good defense. Where a widow, with knowledge of her rights, makes an unequivocal assumption of ownership of one of two properties between which she has a right to choose, it is an election. Parties taking under a decree of partition are estopped from setting up title derived from the deceased owner of the property adverse to that of their co-tenants under the decree. *Burroughs v. De Couts*, S. C. Cal. July 31, 1886: 11 Pac. Rep. 734.

12. DESCENT—*Guardian — Probate Court—Sale—Infant—Will.*—The conversion of the real estate into money by the guardian of a minor ward, does not alter the course of descent. Hence, where a guardian sold real estate of his ward, inherited from her parents, by authority of the probate court, for the purposes of the guardianship, and the ward died during her minority, the surplus proceeds of the estate sold descends, and a will made by the infant ward would be ineffectual to interrupt the descent. Where the real estate had been held by her parents as tenants in common, the surplus proceeds thereof will descend in moieties, according to the canons of descent, one half going to the next of kin of the blood of the father and the other to the next of kin of the blood of the mother. *McCabe and Canning's Case*, S. C. R. I. June 19, 1886; 2 N. Eng. Rep. 62.

13. EMINENT DOMAIN — *Measure of Damages — Railroads—Lessor and Lessee—Machinery—Cost of Removal.*—When the lessees of a lot of ground from year to year are obliged, by reason of the taking of part thereof by a railroad company, to remove therefrom the machinery and apparatus used by them in carrying on their business, and to remove the same elsewhere before the expiration of a current year of their tenancy, they are entitled to recover from the railroad company, the difference between the value of such machinery and apparatus in connection with the business conducted on the property and its value when removed and applied to use elsewhere. Such damages may include the cost of removing the said machinery. *Philadelphia, etc. Co. v. Getz*, S. C. Penn. Oct. 4, 1886; 18 Weekly Notes of Cases, 193.

14. EQUITY—*Reforming Deed.*—A court of equity will reform a written instrument of conveyance so as, by enlarging or narrowing its terms, to make it conform to the original intention of the parties as expressed in their verbal contract; and this, notwithstanding the statute of frauds, the spirit of which is not thereby violated. *Noel v. Gill*, Ky. Ct. of App. Sept. 21, 1886; 1 S. W. Rep. 428.

15. ———. *Specific Performance — Inadequacy of Price—Fraud.*—Mere inadequacy of price is no ground for the rescission of a contract. To constitute a case for the interference of a court of equity, such inadequacy must be coupled with fraud, weakness of mind, or pecuniary embarrassment. *McKinney v.* Crady, Ky. Ct. App. Sept. 11, 1886; 1 N. W. Rep. 402.

16. EXECUTION—*Homestead— Gift — Liability to Indebtedness Prior to Acquisition—Petition to set Apart—Pleading.*—Under the statutes of Kentucky, (Gen. St. c. 38, art. 13, § 16,) land acquired by gift by a debtor, either before or after the debt sought to be enforced against it was created, and used and occupied by the debtor as a homestead, is not liable to execution or other process for debt. A petition in proceedings to have land set apart as a homestead need not state that the land was acquired and used as such, prior to the creation of the debt sought to be enforced against it. *Holcomb v. Hood*, Ky. Ct. App. Sept. 9, 1886; 1 S. W. Rep. 401.

17. EXTRADITION—*Habeas Corpus—Fugitive from Justice—Requisition—Authentication of Information—Certificate of Governor — Authentication by Signature of Prosecuting Attorney—Fraud of Sheriff.*—The appellant committed a felony in Michigan, and fled to Indiana, where he committed another felony, for which he was indicted, arrested, and imprisoned. While he was in prison a requisition from the governor of Michigan was delivered to the governor of Indiana, who issued his warrant. After this warrant was issued, the appellant escaped, and fled to Ohio; whereupon a requisition was obtained, and, on a warrant issued by the governor of Ohio, the appellant was brought back to the prison from which he had escaped, and after a time the prosecutor entered a *nolle prosequi*. *Held*, that the appellant was rightfully surrendered to the agents of the State of Michigan. It is not necessary for the governer who issues a requisition for a fugitive from justice to certify that the information and other papers accompanying the requisition are genuine; it is sufficient to certify that they are duly authenticated. Where the papers and information are authenticated by the signature of the prosecuting attorney, and by affidavit, it is sufficient. The fact that the sheriff in charge of the jail in which the appellant was confined, knew that there was to be no trial of the indictment found against the appellant in this State, would not prejudice the rights of the State

of Michigan. *Hackney v. Welsh*, S. C. Ind. June 26, 1886; 8 N. East. Rep. 141.

18. FRAUD—*Evidence—Functions of Court and Jury—Sheriff's Sales—Where Evidence of Fraud Wholly Insufficient, Court Should Withdraw the Case from the Consideration of the Jury—Evidence Held Insufficient to go to a Jury Upon an Allegation of Fraud.*—While it is true that juries are the judges of the credibility of witnesses, it is the function of the court to pass upon the sufficiency of the whole testimony. If the jury should accept the uncorroborated testimony of one witness, and disregard without reason the opposing and concurring testimony of five equally credible witnesses, with equal opportunity of observation and knowledge, it is within the power of the court trying the case, and where the question is properly raised for the Supreme Court on writ of error, to pass upon the sufficiency of the testimony and declare its convictions, notwithstanding the verdict. That a property was purchased at a very low price, and that the former owner continued in possession after the sale, might be urged with much force as a badge of fraud in the case of a private sale. But such an inference does not arise in case of a judicial sale. At a sheriff's sale, open to all bidders, the fact of a small price is entitled to no weight whatever as the basis of an inference of fraud. Before a title to real estate purchased at an open public judicial sale, for the highest price offered, can be swept away, fraud must be proved by evidence of a satisfactory character, and if there is no such evidence, the jury should be so instructed, and the case withdrawn from their consideration. While fraud, like any other fact, can be proved by indirect evidence, it is a serious allegation, and not to be lightly inferred. Though a number of circumstances are shown, which might be expected if fraud existed, if they are equally consistent with an innocent purpose, they do not singly or collectively warrant a conclusion of fraud. An agreement between the purchaser at a sheriff's sale and the defendant in the execution, that the former will convey the property to the latter upon being reimbursed for all the money he has expended, is lawful. *Meade v. Conroe*, S. C. Penn., Oct. 4, 1886; 18 Weekly Notes of Cases, 176.

19. ———. *Fraudulent Conveyance—Title of General Assignee.*—A general assignee stands in the shoes of a creditor as against a fraudulent grantee of his assignor, and he may sue to set the deed aside. A general assignee, though he represents the assignor, is not bound by his fraudulent conveyance to his wife. *Schaller v. Wright*, S. C. Iowa, June 14, 1886; 22 Rep. 401.

20. ———. *Misappropriation of Trust Funds — Trustees' Commissions— Taxes Paid to be Allowed.*—Where a trustee has misappropriated trust funds to his own use, in a suit against the sureties on his bond, who are found liable for the full amount which would be due from the trustee upon a proper management of the property intrusted to him, the sureties are to be allowed a sum equal to what would have been allowed the trustee as charges and commissions had he properly managed the estate; but such commissions are to be allowed but once where the trustee has continued to hold the funds for management after the parties for whom they were so held were entitled to receive them, and the trustee is to be allowed taxes paid by him in such case where they were paid on property which he falsely pretended to hold in order to conceal his fraud in disposing of it. *McKim, Judge, etc. v. Hibbard*, S. J. Ct. Mass., Sept. 16, 1886; 8 N. East. Rep. 152.

21. INJUNCTION.—*Threatened Trespass—Proposed Structure — Ways — Highway Commissioners — Discretion.*—A mere threat to commit a trespass upon real estate is not in itself evidence of such an irreparable injury as to justify an injunction, where there is no allegation of insolvency of the defendant. In order to warrant an injunction against the erection of a proposed structure, a very strong case must be made out, both by the bill and the proofs, as to the injurious effects of such a structure. Otherwise the courts will leave the injurious effects to be ascertained by experiment. The commissioners of highways are invested with discretion as to the proper method of construction of embankments and bridges to be erected by them on the line of public highways within their jurisdiction. *Thornton v. Roll*, S. C. Ill., Sept. 9, 1886; 8 N. East. Rep. 145.

22. INSURANCE.—*Life Insurance—Action—Parol to Supplement Written Instrument—Legal Representatives—Right to Maintain Action.*— C. obtained a certificate of life insurance from the United Order of the Golden Cross, payable to H. at C.'s death. In an action by C.'s executor against H. to recover the same, *held*, that evidence was admissible to prove that the defendant promised C. that, after deducting from the insurance money whatever sum might be due him from C. at C.'s death, he would pay the balance to C.'s heirs. *Held, also*, that the legal representative of deceased promisee is the proper party to enforce the contract, though made for the benefit of the heirs. *Catland v. Hoyt*, S. C. Me., Sept. 20, 1886; 5 Atl. Rep. 775.

23. INTEREST.—*Computation—When Rests are to be Made.*—A., to whom a part of the principal of a trust fund was to be paid upon his becoming of age, reached his majority May 16, 1873, and at that time the trustee rendered an account of the trust property held by him for the benefit of A., and B., A.'s brother. The trustee, at the time, had misappropriated to his own use a portion of the funds held in trust; but in his account included accumulations, real or pretended, to a certain amount, and treated the property previously disposed of as still in his hands. On November 17, 1875, a settlement was made between the trustee and A. on the basis of the account, and the income of A.'s proportionate share, with its proportionate accumulation from May 16, 1873, the date of A.'s majority, to November 17, 1875, was paid A., together with $2,000 out of his share of the principal fund. *Held*, that interest was properly cast upon A.'s share of the principal, with its share of added accumulation remaining in the trustee's hands, from May 16, 1873, a rest being made as of that date; an exception having been made where the trustee was charged with dividends paid. In a suit against a trustee for misappropriation of funds, interest is to be computed to the date of the execution. *McKim, Judge, etc. v. Hibbard*, S. J. Ct. Mass., Sept. 16, 1886; 8 N. East. Rep., 152.

24. LACHES.— *Action for False Representations—Failure to Enforce Judgment.*—Plaintiff's intestate held a judgment against the defendant for fifteen years (once renewed), which he had failed to collect by execution, and finally suffered to outlaw, trusting to defendant's representations that he had no property liable to be applied in satisfaction

thereof. The defendant had fraudulently transferred lands to his father before the recovery of the judgment, which he untruly represented to have been upon full consideration paid, and had otherwise deceived his judgment creditors in respect to the ownership of his property. *Held*, that reasonable diligence required that the creditor should seek to discover the property of the debtor, or the consideration therefor alleged to have been received, by appropriate proceeding in court, and not to rest implicitly upon the statements and conduct of a hostile and interested party till his legal remedies upon the judgment were lost by lapse of time; and that the plaintiff was not, therefore, entitled to bring an independent action for damages by reason of the alleged fraud and deceit of defendant. *Morrill v. Madden*, S. C. Minn., Sept. 6, 1886; 29 N. W. Rep. 193.

25. LANDLORD AND TENANT.—*Defect in Premises—Liability of Landlord to Repair—Several Tenants—Neglect—To Whom Liable.*—In the absence of any secret defect, deceit, warranty, or agreement on the part of the landlord to repair, he cannot be held liable to the tenant, or any one rightfully occupying under him, for an injury caused by the leased premises getting out of repair during the term, unless it be by reason of his own wrongful act, or failure to perform a known duty. This principle extends to cases where premises are leased to several tenants, and the injury has been caused by a defect in parts used by all of them in common, like halls and stairways. Where a landlord has been guilty of some wrongful act or breach of positive duty in not repairing leased premises, he is not liable for an injury caused thereby to one occupying the premises without rightful authority, as to a sub-tenant in possession contrary to the terms of the original lease. *Cole v. McKey*, S. C. Wis., Sept. 21, 1886; 29 N. W. Rep. 279.

26. LIMITATIONS. — *Statute of Limitations — Adverse Possession—Co-Tenancy—Estoppel — Probate Court—Jurisdiction.*—Where a conveyance is made by a party in the exclusive possession, under a deed which purports to convey the whole property, and the grantee goes into the open and notorious possession of the whole, neither grantor nor grantee having notice of a co-tenancy, their possession, if for the statutory period, will create a good title by adverse possession in the grantee. A party who is in possession of land under a deed will not be estopped from asserting title, by adverse possession, by the action of the probate court in decreeing to the heirs of a former owner an undivided one-half of the property. Had he appeared in the probate proceedings, and set up his adverse title, the probate court would have had no authority to hear and determine the question raised. *Bath v. Valdez*, S. C. Cal., July 30, 1886; 11 Pac. Rep. 724.

27. ———. *Statute of Limitations — Adverse Possession — User of Water — Disputing Right of Possession.*—An adverse possession and user of water for five years continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar his right thereto; but a mere claim of right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto. If water is held and used adversely to the true owners for five years next before suit is brought, the mere disputing of the right to such possession by the owners will not prevent the bar of the statute. *Cox v. Clough*, S. C. Cal., July 30, 1886; 11 Pac. Rep. 732.

28. ———. *Statute of Limitations — Guaranty — Consideration — Practice.* — The question was, whether the giving of a guaranty on a promissory note by the defendant while bankruptcy proceedings were pending against him, removed the bar of the statute of limitations, and, neither party wishing to go to the jury, the court ordered a verdict for the plaintiff. *Held*, that the verdict should be upheld if there was any evidence to sustain it; and that the evidence was quite as consistent with the idea that the guaranty was given for a lawful as for an unlawful purpose. The moral obligation resting upon one whose debts have been discharged in bankruptcy, is a sufficient consideration for a guaranty of their payment. *Robinson v. Larabee*, S. C. Vt., Aug. 21, 1886; 7 East. Rep. 64.

29. MASTER AND SERVANT.—*Negligence of Fellow-Servant—Defective Shaft in Mine.*—In an action against a mining company for personal injuries suffered by an employee, where the testimony disclosed that the partition between the stairway and car-track in the shaft of a mine which plaintiff was ascending was defective, so that a timber thrown down the car-track went into the stairway, and injured him, but that the promoting cause of the injury was the negligence of a co-employee in throwing the timber down the shaft: *Held*, that the defendant was not liable. *Kivem v. Providence, etc. Co.*, S. C. Cal., Aug. 12, 1886; 11 Pac. Rep. 740.

30. MORTGAGE.—*Chattel Mortgage—Void for Usury—Constructive Delivery—Trover and Conversion—Judgment in Action to Recover Other Property not a Bar.*—S. held a chattel mortgage upon wheat and other personal property belonging to W. admitted to be usurious. It also contained a clause authorizing the mortgagee to take possession of the mortgaged property before it became due. A few days before it matured he procured of W., the mortgagor, a writing by which the latter, in terms, "turned the property" described in the mortgage to S. The wheat was not, however, removed, but still remained in the granary of W., and under his control. Subsequently S. came to W.'s premises, and without his consent, and against his will, took and carried away the wheat, and thereafter sold the same. *Held*, that the mortgage was void, and that the property was not actually applied in payment of the same, through the constructive possession obtained under the writing referred to, and that W. was entitled to recover the value of the wheat so taken in an action for the conversion thereof. *Held, also*, that the judgment in a subsequent action by W. to recover other property covered by the same mortgage, in which the question of usury was not raised, was not a bar to this suit. *Witherell v, Stewart*, S. C. Minn., Sept. 7, 1886; 29 N. W. Rep. 196.

31. MORTGAGES.—*Foreclosure—Rents and Profits—Rents and Profits Pledged for Payment of Mortgage Debt---Sequestration of Rents—Taking Possession a Means of Payment—Payment—Appropriation of Payments by Law.*—A prior mortgagee, who has had possession of the mortgaged premises, must account for rents and profits to the subsequent incumbrancer, but a subsequent incumbrancer in possession is not bound to account to the prior incumbrancer. A mortgage which does not, by its terms, pledge the rents and profits of the mortgaged premises for the payment of the mortgage debt, gives the mortgagee no lien on them, and the mortgagor may take them, or assign

them, without liability to account to the mortgagee for them. Under the rule now in force, a prior incumbrancer has the right, as against the mortgagor and subsequent incumbrancers, in his case security is precarious, to have the rents of the mortgaged premises accruing subsequent to the appointment of a receiver sequestered for his benefit. Taking possession of the mortgaged premises is a means to which a mortgagee may resort to obtain payment of his debt, and a payment obtained in this way is subject, in respect to its appropriation, to the legal rules governing the appropriation of other payments. A debtor who makes a payment to his creditor, to whom he owes two or more debts, has a right to direct to which debt the payment shall be applied. If he simply hands the money over to his creditor, without direction as to its application, his creditor may apply the money as he pleases; and if neither party has exercised the right of appropriation, and a dispute subsequently arises, the court will make the appropriation, and in doing so, will, as a general rule, apply the payment to the debt which is least secure. *Leeds v. Gifford*, Court of Chancery, N. J. Sept. 24, 1886; 5 Atl. Rep., 795.

32. NEGLIGENCE—*Contributory Negligence—Travelers at Railroad Crossing.*—It is negligence *per se* for a traveler to cross a railroad track without first looking and listening for a coming train. If his view is obstructed, he must listen the more attentively; and if he is riding with bells attached to his sleigh, and does not stop his horse in order to listen, he is guilty of such contributory negligence that no action can be maintained against the railroad company for any injuries sustained. *Chase v. Maine etc. Co.*, S. C. Me., Sept. 20, 1886; 5 Atl. Rep. 771.

33. PARTNERSHIP.—*Action not upon Partnership Matters—Surplusage—Pleading—Judgment—Action to Set Aside Former Judgment—Pleading.*—Describing the plaintiffs in the title of an action as partners is surplusage, where the suit is not upon a partnership matter, and an allegation of compliance with the law relative to filing and publishing notice of partnership is unnecessary. In an action to set aside a judgment brought by a subsequent creditor, an allegation that the property levied upon by the defendants is all the property of the common judgment debtor is sufficient, without the further allegation that an execution had been issued, and returned unsatisfied. *Lee v. Orr*, S. C. Cal. Aug. 12, 1886; 11, Pac. Rep. 745.

34. QUO WARRANTO—*Right to Office--Suit by Rival Candidate—Justice of the Peace—Judicial Office --Office and Officers—Election to Office not Judicial—Township Trustee--Computation not Judicial*—Proceedings between rival candidates to determine the right to office will not prevent the state from questioning the right of the party attempting to hold it The office of justice of the peace is a judicial office under our constitution and statutes. A judicial officer may be elected to an office not judicial, before the expiration of his term, provided the term of the second office does not begin until after the expiration of the term of the judicial office. Appellant and M. were opposing candidates for the office of township trustee. M. held a commission as justice of the peace for a term of four years from April 17, 1882. The term of trustee began April 16, 1886. *Held*, that M.'s term as justice of the peace did not expire until midnight of April 16, 1886; that he was, therefore, ineligible, and appellant, having received the next highest number of votes, was entitled to the office. *Vogle v. State ex rel.* S. C. Ind. Sept. 14, 1886; 8 N. East. Rep. 164.

35. SALE.—*Warranty*—There is an implied warranty in the sale of hogs purchased for the market, that they are fit for that purpose, when the vendee, having no opportunity of inspection, trusts to the judgment of the vendor to select them, and both parties understand for what they are intended. In case of a breach of such warranty, the vendee can recoup the damages without a return of the chattels or an offer to return them. *Best v. Flint*, S. C. Vt. July 1. 1886; 2 N. Eng. Rep. 604.

36. ———. *Wrongful Sale of Stock—Chargeable for Dividends Paid after Sale.*—Where a trustee under a will has wrongfully disposed of shares of stock held by him in trust, and appropriated the proceeds to his own use, but has constantly represented the stock as being in his possession, he is liable for the value of the same, as that value was at the date of the writ, in a suit brought for an accounting, and is chargeable for all dividends that were payable on the same up to that time, notwithstanding a power was given him in the will to sell and dispose of the trust property as he deemed advisable, and to change investments, and where the sale of the stock was a part of a transaction by which the funds were to be misappropriated. *McKim Judge etc. v. Hibbard*, S. J. Ct. Mass. Sept. 16, 1886; 8 N. East. Rep., 152.

37. TENANTS IN COMMON.—*Rights and Liabilities of—Action by and Against Each Other—Assumpsit Between Co-Tenants of Land for the Rents and Profits—Set-Off—Lime and Fertilizers.*—In 1874 A., and B., his ten-year old son, received a devise as tenants in common of certain land charged with the payment of certain legacies. A. took possession of the land, paid the above legacies, and all the taxes, farmed the land, fertilized it, repaired the fences when necessary, and received to his own use all the crops until his death in 1884. Until 1880 B. lived with his father, but had nothing to do with this land. From that time until his father's death he lived elsewhere, earning his own living. He never received any share of the profits of the land. In an action of *assumpsit* brought by B. against the executors of A. for his share of the rents and profits of this land: *Held*, that evidence as to the value of lime or other fertilizer used by B. in farming the land was admissible as a set-off. *Query*, whether an action of *assumpsit* for a proportion of the rents and profits of land held in common, can be maintained by one co-tenant against another. *Luck v. Luck*, S. C. Pa., Oct. 4, 1886; 18 Weekly Notes of Cases, 195.

38. TROVER AND CONVERSION.—*Evidence of Conversion — Defendant's Breach of Contract.* — To constitute a conversion of chattels, there must be some exercise of dominion over the property, in repudiation of, or inconsistent with, the owner's rights. In an action of trover for a horse hired by the defendant to go to and from a place named without stopping, his mere delay in returning is not sufficient evidence of a conversion. *Evans v. Mason*, S. C. N. H., July 30, 1886; 5 Atl. Rep. 766.

39. TRUST.— *Misappropriation of Funds — Sale of Stock — When Chargeable with Full Value.* — Where a trustee under a will has wrongfully dis-

posed of stocks, and appropriated the proceeds to his own use, he and his sureties, upon an accounting, are liable for the value of the shares as inventoried by the trustee at the time of the assumption of his trust, or for the market value of the same at the date of the writ, in a suit brought against the sureties, and where the value is more than the inventoried value, in the absence of evidence of what was actually obtained for the stocks. *McKim, Judge, etc. v. Hibbard*, S. J. Ct. Mass., Sept 16, 1882; 8 N. East. Rep. 152.

40. TRUSTS.—*Resulting Trust — Termination of Trust —Cemetery — Part of Land not Used for Cemetery — Abandonment of Cemetery—Re-Conveyance by Trustee—Adverse Possession by Trustee—Appointment of Trustees.*—The author of an express trust, not having provided, in the creation of such trust, to whom the property should belong upon a failure or termination thereof, has a right to transfer the property. The purchaser takes subject to the trust, and stands in the position which the grantor would have occupied but for the conveyance. Where land was conveyed to a trustee by the city of Los Angeles to be used for cemetery purposes, and only a small portion of the land was devoted to such purpose, there was, as to the portions not so used, when it was established that it could not be used for such purpose, a resulting trust in favor of the city and its assigns. By abolishing a cemetery, the land for which had been conveyed by the city of Los Angeles to a trustee to be used for cemetery purposes, the city terminated the trust relation, and it thereupon became and was the duty of the trustee to re-convey the property. A trustee cannot retain possession of lands held by him in trust after repudiating his trust, and claim adversely, until his claim ripens into a title under the statute of limitations. A court of equity will see to it that trustees are appointed to manage trust property when required for its safety or proper administration, but it will not do so when no good result is to be accomplished thereby. *Schlessinger v. Mallard*, S. C. Cal., July 30, 1886; 11 Pac. Rep. 728.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

27. A. contracts to build a house for B. and in the contract there is a clause that A. will deliver the building free of mechanic or other liens. What effect would such a clause have on material men, sub-contractors and day laborers. If B. paid A. in full according to contract, and it turns out that A. has not paid for all the material and still owes sub-contractors and day laborers could they, under the above claim, file a lien on said building. Cite authorities.

J. W. S.

QUERIES ANSWERED.

Query 17. [23 Cent. L. J. 167].—A county purchases a tract of land (under the provisions of an act of Congress) upon which to locate a Co. seat. The town is platted into blocks, lots, streets and alleys. The plat is acknowledged by the county commissioner, and recorded. Would non-user of a street or alley for 25 years amount to an abandonment? If not, what length of time would amount to an abandonment.

W. H.

Answer:—It is sometimes held that private easements may be lost by non-user, but generally only in cases where adverse rights have intervened. Corning v. Gould, 16 Wend. 531; Hall v. McCaughey, 51 Penn. St. 43; Owen v. Field, 102, Mass. 90; Wilder v. St. Paul, 12 Minn. 192; Veghte v. Rantan & Co., 4 C. E. Green, 142; Arnold v. Stevens, 24 Pick, 106; Jewett v. Jewett, 16 Barb. 150; 3 Kent's Com. 448. But the rights of the public in streets and public places are never lost by non-user; and many authorities hold that they cannot be lost even by adverse possession. 2 Dill. Mun. Corp. §§ 667-675 and cases cited. In this case an abandonment will never accrue from non-user. M.

RECENT PUBLICATIONS.

THE AMERICAN REPORTS. Containing all decisions of general interest decided in the courts of the last resort in the several States with notes and references by Irving Browne. Vol. LIV. containing all cases of general authority in the following reports: 77 Alabama; 8 Colorado; 73 Georgia; 112 Illinois; 104 Indiana: 65 Iowa: 15 Lea; 4 Mackey; 64 Maryland; 140 Massachusetts; 55 Michigan; 84 Missouri; 47 New Jersey Law; 101 New York; 43 Ohio State; 20 Texas Court of Appeals; 64 Wisconsin. Albany; John D. Parsons, Jr., Publisher, 1886.

We have had occasion more than once of late, to call the attention of our readers to this valuable compilation of adjudged cases. We can now add nothing to the commendation which we have hitherto bestowed upon it. The volume before us is uniform with its predecessors and fully up to their standard. There is, however, one feature in this volume upon which we may make a remark. Besides the customary index and table of cases, there is, prefixed to the book, a list of cases overruled doubted or denied. This is an unusual appendage to volumes of reports and we think is worthy of adoption by all reporters.

JETSAM AND FLOTSAM.

A PROBLEM SOLVED.—In a book review the *Irish Law Times* recently said: "Those who may have been 'metagrobolised' by the Greek motto on the title page, have yet had no difficulty in 'incornifistibulating, and laying up into the hamper of their understanding' the instructive purport of his subsequent pages." This lets in a flood of light upon a problem hitherto inscrutable, to-wit: the origin of the Irish brogue. It is not strange that the tongues of people who use words of such dimensions should become twisted—the wonder is that they are not effectually tied into a hard knot.

A boy twelve years old was the important witness in a law suit. One of the lawyers, after cross-questioning him severely, said: "Your father has been talking to you and telling you how to testify, hasn't he?" "Yes," said the boy. "Now," said the lawyer, "just tell us how your father told you to testify." "Well," said the boy modestly, "father told me that the lawyers would try and tangle me in my testimony, but if I would just be careful and tell the truth, I could tell the same thing every time."—*Ex.*